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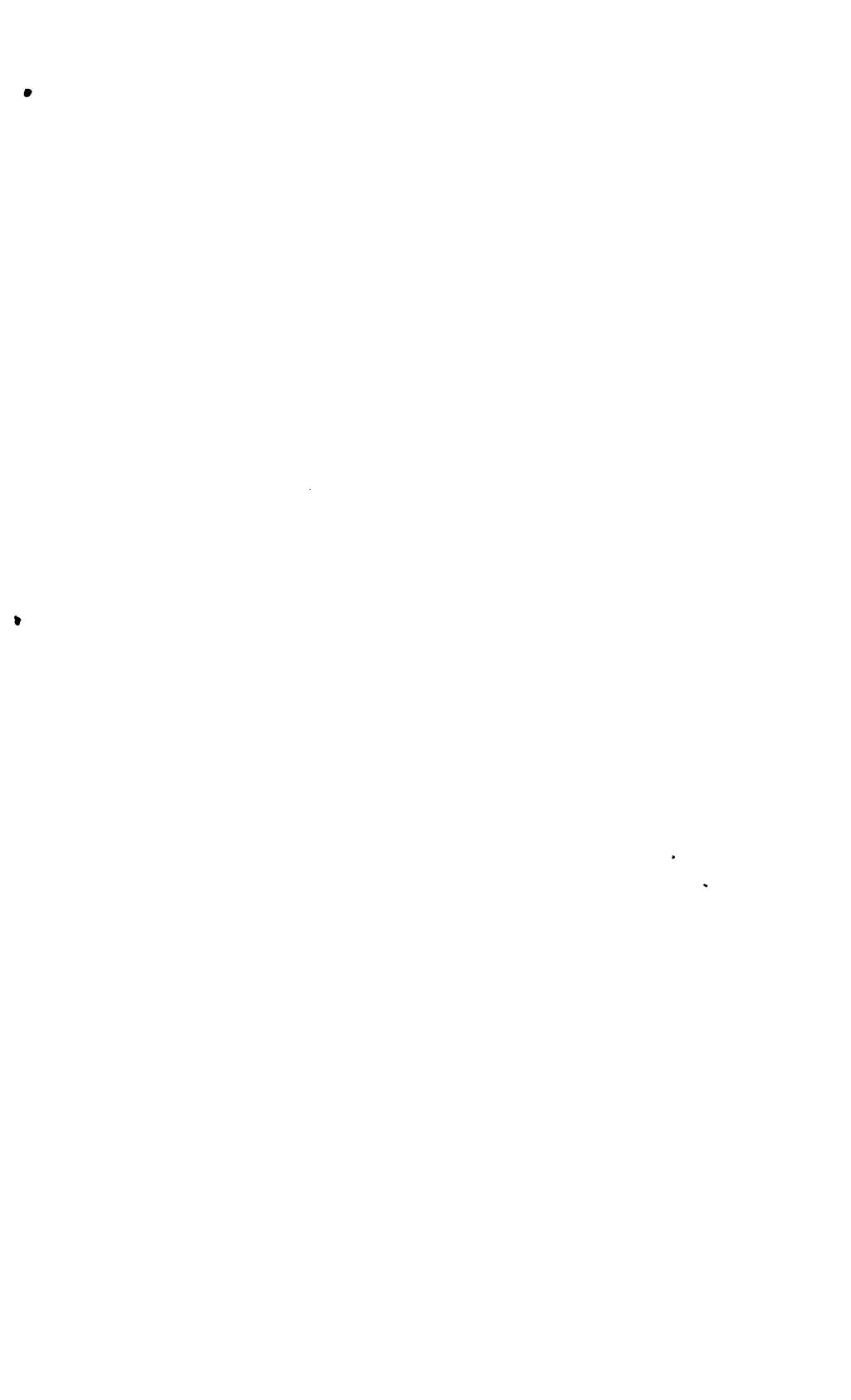
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June 17

REPORTS OF CASES
DECIDED IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK

FROM AND INCLUDING DECISIONS OF JULY 15, 1919, TO
DECISIONS OF JANUARY 20, 1920,

WITH

NOTES, REFERENCES AND INDEX.

J. NEWTON FIERO,
STATE REPORTER.

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JUDGES OF THE COURT OF APPEALS.

FRANK H. HISCOCK, CHIEF JUDGE.

EMORY A. CHASE,*

FREDERICK COLLIN,

WILLIAM H. CUDDEBACK,†

JOHN W. HOGAN,

BENJAMIN N. CARDODOZO,

CUTHBERT W. POUND,

CHESTER B. McLAUGHLIN,

FREDERICK E. CRANE,*

WILLIAM S. ANDREWS,*

ABRAM I. ELKUS.‡

* Justices of the Supreme Court serving as Associate Judges by designation of the Governor, under section 7 of article VI of the Constitution, as amended in 1899.

† Died August 16, 1919.

‡ Appointed by the Governor November 12, 1919, vice WILLIAM H. CUDDEBACK, deceased.



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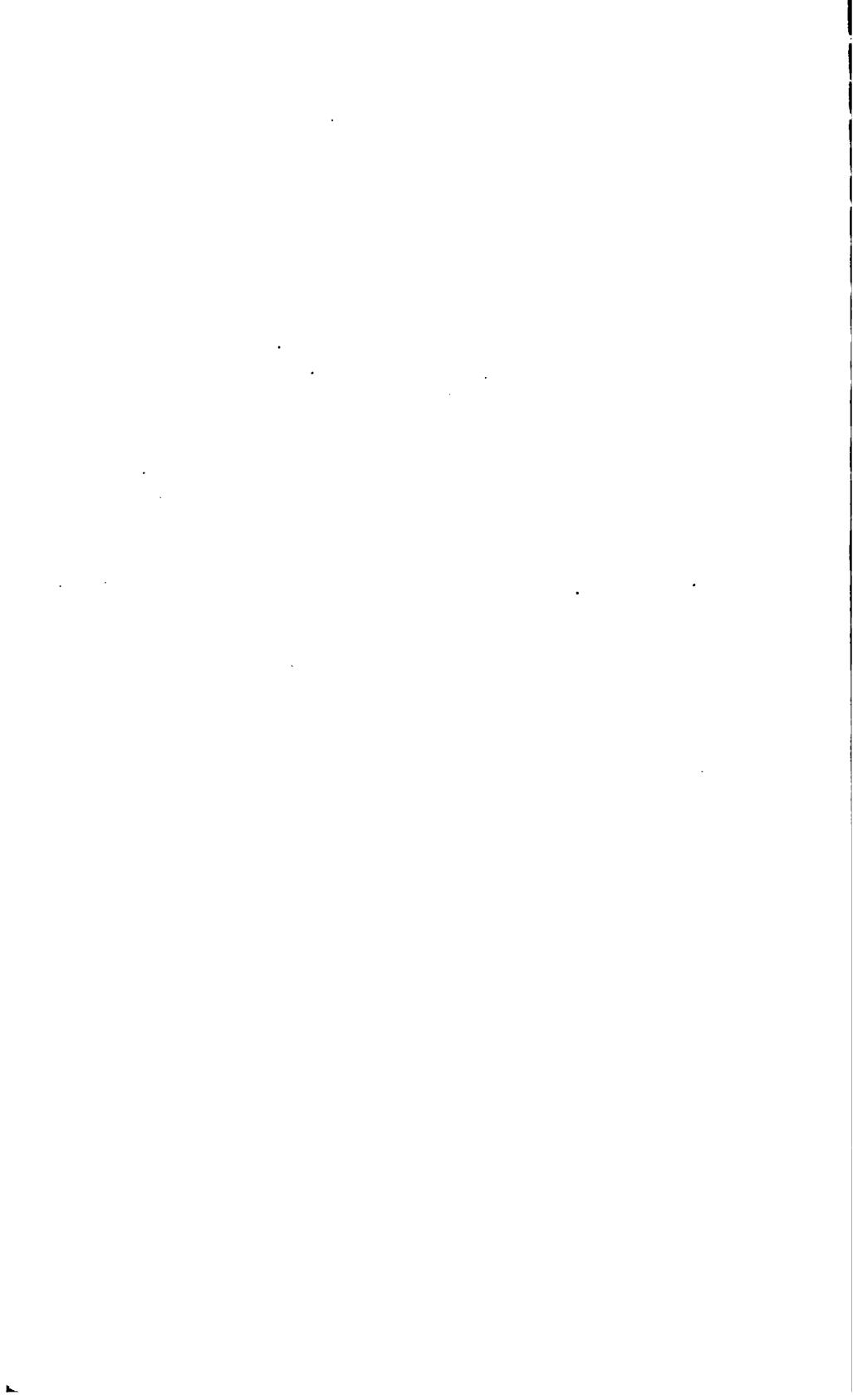


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CASES DECIDED
IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK,

COMMENCING JULY 18, 1919.

AUBURN DRAYING COMPANY, Respondent, v. WILLIAM WARDELL et al., Appellants.

Labor unions — conspiracy — boycott — injunction — acts of members of labor unions calculated and intended to destroy plaintiff's good will, trade and business — when such acts may be restrained by injunction.

1. Personal liberty or the right of property embraces the right to make contracts for the purchase of labor of others and equally the right to make contracts for the sale of one's own labor and the employment of one's individual and industrial resources. It is subject, however, to the condition that its exercise in the particular transaction shall not be inconsistent with the public interests or hurtful to the public order or detrimental to the common good. The right of the citizen to effectuate his desire or judgment without interference or compulsion must always be exercised with reasonable regard for the conflicting rights of others. An invasion of this right, without a cause or reason which the law deems essential or useful in the existence or betterment of organized society, is a legal and actionable wrong which may be compensated or restrained.

2. There is an important and perceptible difference, in the realms of justice, civil order and law, between the voluntary acts of an individual, done in the right of personal freedom, the right to do or to refrain from doing, and their injurious effects, and the acts of others, undesired by them, initiated and performed in virtue of the deception, compulsion or oppression on the part of that individual, and their injurious effects.

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Statement of case.

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3. In an action brought by an employer of labor against members of labor unions to recover damages and for a permanent injunction, the trial court made findings which are supported by evidence to the effect that the defendants sought the destruction of plaintiff's business and that their acts were calculated to and intended to destroy the plaintiff's good will, trade and business, and, in part, accomplished that purpose, and that such acts were done in furtherance of a conspiracy from which plaintiff was at the time of the commencement of the suit suffering irreparable loss and damage. *Held*, that the means employed were unjustifiable and unlawful and defendants should be restrained from employing them. (*Bosser v. Dhuy*, 221 N. Y. 342, distinguished.)

Auburn Draying Co. v. Wardell, 178 App. Div. 270, affirmed.

(Argued April 17, 1919; decided July 15, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered June 4, 1917, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action for an injunction, and bringing up for review the interlocutory judgment.

The facts, so far as material, are stated in the opinion.

Frederick A. Mohr for appellants. The findings as to motive, or purpose, do not sustain the judgment. (*Davis v. Portable Hoisting Engineers*, 28 App. Div. 398; *Davis v. Robinson*, 84 N. Y. Supp. 837; *Butterick Pub. Co. v. Typo. Union No. 6*, 50 Misc. Rep. 1; *Tallman v. Gaillard*, 27 Misc. Rep. 114; *National Protective Assn. v. Cummings*, 65 N. Y. Supp. 946; *Mills v. U. S. Printing Co.*, 99 App. Div. 605; 199 N. Y. 76; *Wunch v. Shankland*, 59 App. Div. 482; *Rosenau v. Empire Circuit Co.*, 115 N. Y. Supp. 517; *Tanenbaum v. N. Y. Fire Ins. Co.*, 33 Misc. Rep. 134; *National Fireproofing Co. v. Mason Builders Assn.*, 169 Fed. Rep. 259; *Matthews v. Associated Press*, 136 N. Y. 333.) There is no evidence to sustain the finding that there was injury to or interference with the "property" of the plaintiff. (*People v. Davis*, 159 App. Div. 484; *Newton v. Erickson*, 70 Misc. Rep. 291; 144 App. Div. 939; *Bosser v. Dhuy*, 221 N. Y. 359;

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Parks Son Co. v. Druggists Assn., 175 N. Y. 1.) There is no evidence to sustain the finding that the evidence establishes the fact that the employers of the defendants who were patrons of the plaintiff discontinued business relations with the plaintiff through the fear of external pressure, emanating from the labor organizations and not from the voluntary action of their employees. (*Thomas v. M. M. P. Union*, 121 N. Y. 50; *Boissert v. United Brotherhood*, 137 N. Y. Supp. 321.) The evidence does not sustain the finding that the motive or purpose of the defendants' combination was the injury or destruction of plaintiff's business. (*Lambert v. People*, 9 Cow. 597.)

Walter Gordon Merritt, George B. Turner and John Taber for respondent. The defendants are engaged in an unlawful combination to injure the plaintiff's good will, trade and business. (*Bossert v. Dhuy*, 221 N. Y. 342; *Martin on Modern Law of Labor Unions*, 35, § 29; *Loewe v. California State Fed. of Labor*, 139 Fed. Rep. 71; *Pickett v. Walsh*, 192 Mass. 572; *State v. Glidden*, 55 Conn. 47; *Casey v. Cincinnati Typographical Union*, 45 Fed. Rep. 135; *National Fire Proofing Co. v. Mason Builders*, 169 Fed. Rep. 259; *Curran v. Galen*, 152 N. Y. 33; *Aikens v. Wisconsin*, 195 U. S. 204; *Hitchman C. & C. Co. v. Mitchell*, 245 U. S. 229; *Martell v. White*, 185 Mass. 255.) The strikes against the complainant's customers for utilizing the plaintiff as a common carrier are unlawful. (*Pickett v. Walsh*, 192 Mass. 572; *Burnham v. Dowd*, 104 N. E. Rep. 841; *Thomas v. C. R. Co.*, 62 Fed. Rep. 818; *Moore v. Bricklayers' Union*, 23 Wkly. L. B. 665; *Kemp v. Division No. 241*, 99 N. E. Rep. 389; *Jackson Iron Works v. Hurlbut*, 158 N. Y. 34; *Heuman v. M. H. Powers Co.*, 162 N. Y. Supp. 590; *Lawson v. Connolly*, 45 L. R. A. [N. S.] 1151.)

COLLIN, J. This is a contest between the plaintiff and the labor unions of the city of Auburn, New York. There

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is no serious dispute concerning the material facts. In so far as there is a dispute, we have concluded that the findings of the Special Term are supported by the evidence. While there was not unanimity in the decision of the Appellate Division the divergence related to legal conclusions or the applicability of legal principles.

The action was commenced November 29, 1913. The plaintiff, a corporation, was extensively and prosperously engaged in the general trucking business in the city of Auburn, New York. It employed from thirty to forty-five men, the greater number of whom were not members of a labor union. There existed in Auburn, as voluntary unincorporated labor organizations, twenty-two local labor unions, representing the various trades and occupations, with an aggregate membership of about fourteen hundred persons. There existed also the Central Labor Union, an unincorporated association, made up of delegates from the individual unions, and the members of the local unions were members of it and bound by its constitution, rules, regulations and by-laws. It and certain of the local unions are, through representation by officers, defendants in the action. (Code of Civil Procedure, sections 1919-1924.) Expressed objects of the Central Labor Union were to secure united action in defense of the rights and for the protection of the interests of the working classes and to arbitrate and adjust difficulties that might arise between workmen and their employers. Objects of the local unions were increased wages, greater efficiency, employment, and the improvement of working and social conditions through united action.

The defendant Teamsters' Union No. 679 was organized November 9, 1912. The plaintiff neither forbade nor encouraged its employees to join. In July, 1913, representatives of the unions stated to the plaintiff that unless it took the necessary means to get its men to join the union, Teamsters' Union No. 679, it would be placed on the unfair list. The plaintiff refused to so act and Team-

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sters' Union No. 679 passed a resolution placing the plaintiff on the unfair list, that is, listed it as an employer who refused to employ and discriminated against union labor and refused to give its employees the conditions asked for by labor organizations with respect to hours of labor, shop conditions and other similar working conditions. Union No. 679 reported, in accordance with a standing resolution of the Central Labor Union, the placing of the plaintiff on the unfair list. The Central Union insisted to the plaintiff that all its employees must join the union and the plaintiff replied they were free to join if they so chose. They refused to join. The Central Labor Union indorsed the placing of the plaintiff upon the unfair list, thus making, under its rules, the action final and operative. The declaration of principles of the Central Labor Union provided, among other things, as follows: "We shall withdraw and use our influence to have others withdraw all patronage from any unfair employer, or any person patronizing such unfair employer, let his calling be what it may." The by-laws and regulations of the unions provided penalties of fines and expulsion for non-conformity. The Central Union and other local unions took the position that they would consider the company unfair toward organized labor until such time as their employees became members of the Teamsters' Union. They withdrew, and used their influence and positions and their members used their influence and positions to have the employers of their members withdraw patronage from the plaintiff. The findings set forth at length their acts and their effects. In summary, it may be stated that dealers, ice deliverers, bakers, butchers, builders, plumbers and contractors, because of the notices, warnings and declarations of the defendants, in varying and serious degrees discontinued business with the plaintiff and refused further to employ it to do carting, hauling or collection work for fear of loss of business and labor troubles on account of the defendants' combination

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if they continued business with it. Further findings are: " 49. The ultimate hope of the defendants was to better the condition of the members of the unions by bringing into said organization all of the craftsmen and laborers in Auburn, so that their united efforts for higher wages, shorter hours and better working conditions might be more persuasive and effectual, and without such motive or ultimate purpose the boycott would not have been inaugurated; but the immediate business in hand, the specific and direct thing wh ch the defendants were then and there devoting their energies to and focusing all of the disciplined power of their organization upon, was the destruction of the plaintiff's busines , in order that the plaintiff, through its sufferings, might be forced to yield to the demands of the union. What was threatened, intended, and in part accomplished by the defendants was injury to the business and property of the plaintiff; the acts performed and results accomplished being also necessarily injurious to trade and commerce; which injury to trade and commerce was intended to be brought about by the defendants through the performance of such acts. 50. All of the foregoing acts of the defendants and those acting in conjunction with them were done in furtherance of the combination and conspiracy to compel the plaintiff to employ union men exclusively, and to discharge any employee who refused to join the union. * * * 52. The said combination of the defendants and all acts in furtherance thereof were calculated and intended to injure and destroy the plaintiff's good will, trade and business, and all of the defendants were members of said combination and acting in furtherance thereof. 53. At the time of the commencement of this suit, plaintiff was suffering irreparable loss and damage to its trade, good will and business from the acts of the defendants in furtherance of their said combination. * * * 55. There has been, during the entire trouble, no force or violence used or threatened. There has been no misstatement of

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facts, unless the use of the word 'unfair,' when applied to the plaintiff, may have been misleading; and it is not charged that there was any intention to misrepresent the facts in this respect. 56. * * * What was feared by the customers (of plaintiff) was not any voluntary, self-initiated movement of their own employees to quit, but that they would quit because ordered to do so by the organizations to which they belonged, which possessed disciplinary powers to enforce obedience. * * *

58. The said combination of defendants originated solely from the refusal of plaintiff's employees to join the union, the demand made by defendants that plaintiff compel them to join the union, and the refusal of the plaintiff to comply with that demand." As conclusions of law the Special Term found that the combination of the defendants constituted an illegal conspiracy to injure the plaintiff's business and property and their acts were illegal as an intended injury to the plaintiff's business and as unreasonably restrictive of and injurious to trade and commerce and the conspiracy was unlawful as designed to prevent the plaintiff from exercising its lawful trade and calling by threats to do illegal acts; the plaintiff had no adequate remedy at law. The plaintiff was entitled to a decree to recover the damages and a reference to ascertain and report the amount of damages and on the incoming and confirmation of said report to a final judgment against all of the defendants for the amount of said damages thus ascertained, and to a further decree for a permanent injunction against the defendants "to prohibit the enforcement of resolutions, rules or orders of the defendant unions requiring their members to quit the service of employers who patronize the plaintiff, and the giving of notices by or on behalf of said organizations or the officers thereof to such employers, or the public, of an intention to quit provided such employers continued to patronize the plaintiff, and any other attempt or effort to use the powers or authority of the defendant unions

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over their own members for the purpose of inducing or compelling patrons of the plaintiff, or the public generally, against their will, to refrain from dealing with the plaintiff." A final judgment was entered for such relief, upon the confirmation of the report of a referee.

The briefs and arguments of counsel are concerned with a wide range of problems and principles relative to the rights of labor unions and of employers and employees. The determinative facts presented in the case at bar are, however, few, and the decisive principles are established. The defendants, in concerted actions and measures, interfered with the property rights and the property of the plaintiff. As a part of its property was the right to be employed by, to do work for, to transact business with and to receive compensation from all those who voluntarily sought or desired to thus engage with it. Personal liberty or the right of property embraces the right to make contracts for the purchase of the labor of others and equally the right to make contracts for the sale of one's own labor and the employment of one's individual and industrial resources. The right is not and cannot be absolute. It is subject to the condition that its exercise in the particular transaction shall not be inconsistent with the public interests or hurtful to the public order or detrimental to the common good. Moreover, it is common and reciprocal to all citizens. An unrestrained and unlimited exercise on the part of some persons would clash with and encounter the exercise of a similar freedom on the part of others. The question then arises whether the interference with the action of the one is justified by the exercise of some right of the interfering other. The right of the citizen to effectuate his desire or judgment without interference or compulsion must always be exercised with reasonable regard for the conflicting rights of others. The law recognizes the right and holds and enforces that an invasion of it, without a cause or reason which the law deems essential or useful in the

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existence or betterment of organized society, is a legal and actionable wrong which may be compensated or restrained. (*Adair v. United States*, 208 U. S. 161; *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229; *Curran v. Galen*, 152 N. Y. 33; *National Protective Association of Steam Fitters v. Cumming*, 170 N. Y. 315; *Matter of Application of Jacobs*, 98 N. Y. 98.) The action and measures initiated and sustained by the defendants worked serious injury to the property of the plaintiff in consequence of which it sustained substantial damages. Unless the findings of the Special Term and the facts present a legal cause or justification for the interference by the defendants with the business and property of the plaintiff the judgment appealed from is right and must be affirmed.

The interference with and depreciation of the business and earnings of the plaintiff by the conjoint action of the defendants was of the nature and effect of a barrier against access to the plaintiff, its office and place of business. Their action towards the destruction of its business was affirmative and aggressive. It was not simply that the members of Union No. 679, from which the defendants insisted the plaintiff must hire its employees, refused to be employed by the plaintiff or its patrons, unless and until it employed members of the union. The unions and their members sought to induce and induced the employers of labor in the various trades and industries and the people generally in that community to discontinue employing and to abstain from business transactions with the plaintiff, by directly and affirmatively causing loss and injury to their business or interests or fear of loss and injury to their business or interests, in case they did not so discontinue and abstain. They sought to compel and did compel those employers and the people to coerce the plaintiff to unionize its business. They thus attempted and intended to create a general exclusion and isolation of the business of the plaintiff, or in other words, its

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non-existence so long as the plaintiff refused compliance with their demand that it compel its employees to join Union No. 679. The defendants are intentionally attempting to coerce the plaintiff to unionize its business by aggressively inducing its established and potential customers to ignore its existence in order to be free from the loss and injury which the action of the defendants would otherwise bring to those customers.

The rights, in virtue of which the defendants would justify the interference and the injury, are: (a) That of laborers to associate; (b) to bring within the labor organizations as members all laborers; (c) through the coherent and solidified power and influence flowing from association and united efforts to secure for all laborers higher wages, shorter hours, arbitration of labor disputes and better working conditions. Beyond question those rights exist. Labor unions are and for a long time have been recognized by the courts of this country as a legitimate and useful part of the industrial system. Associations of laborers, to accomplish lawful objects by legal means, have been always recognized and protected by the law of this state. The organizations of the defendants were as lawful as the incorporation of the plaintiff. Their members might and should have promoted their strength, welfare and their intelligent and salutary influence and control. Rights that are lawful and purposes that are useful and just cannot, however, be effectuated and accomplished by unlawful means. The individual cannot injure the property rights of another by the means of causing or controlling through duress, coercion, oppression or fraud, the acts of third persons which produce the injury. The individual may do and does many acts which in their effect are or may be coercive as to another. The right to do those acts inheres in the natural freedom and the civil rights which are his. But there is an important and perceptible distinction, in the realms of justice, civil order and law, between the voluntary acts

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of an individual, done in the right of personal freedom, the right to do or to refrain from doing, and their injurious effects, and the acts of others, undesired by them, initiated and performed in virtue of the deception, compulsion or oppression on the part of that individual, and their injurious effects. The individual may lawfully refuse to be employed to drive from his neighbor's field the stray cattle which are destroying the crop and thus, in effect, coerce the neighbor to drive them himself or permit the destruction; but he cannot lawfully prevent, through fraud or other form of dishonesty or compulsion of any nature, another from becoming the employee for such purpose. He may lawfully do that which he cannot lawfully attempt to compel another to do. The one is the exercise of the fundamental right of individual choice and volition; the other is the negation and destruction of the right. In the latter case the individual annihilates as to the others the right which he asserts and maintains for himself, and causes injuries as positively and aggressively as he would did he intentionally disable the other or his industrial resources. The law does not tolerate inequality in the existence and enforcement of rights or the definition and redress of wrongs, and the first condition of individual freedom and opportunity is servitude to law. In the instant case the contest did not arise because the members of Union No. 679, or members of the same occupation and of other unions, chose not to work for the plaintiff or for or with men who did engage in business with it, or sought to persuade, in an orderly and proper manner, persons generally to abstain from business transactions with it. It did not arise in the ordinary and natural exercise by the unions of the right to control their own labor and of the right of association. It arose because the defendants, constituting the entire union population of the city of Auburn, inaugurated and carried on, affirmatively and aggressively, through the agencies of fear and

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coercion, a comprehensive exclusion of the plaintiff from the business of the community, in order to compel it to unionize its business. On the part of the defendants there was organized coercion of the plaintiff into compliance with the demand of the unions that it compel its employees to join Union No. 679, by combining to compel third persons to refrain from having any business relations with it. The defendants were an organized combination, with a unified intent and purpose, causing irreparable damage to the business and property of the plaintiff. Financial pressure, loss of business, interference with freedom of action were imposed by them in order to force the unionization. The law should be and is that the means were unjustifiable and unlawful and the defendants should be enjoined from using them. (*Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229; *Burnham v. Dowd*, 217 Mass. 351; *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497; *Purvis v. United Brotherhood*, 214 Penn. St. 348; *Fink & Son v. Butchers' Union No. 422*, 84 N. J. Eq. 638; *Harvey v. Chapman*, 226 Mass. 191; *W. A. Snow Iron Works, Inc., v. Chadwick*, 227 Mass. 382; *Martell v. White*, 185 Mass. 255; *Cornellier v. Haverhill Shoe Manufacturers Assn.*, 221 Mass. 554; *New England Cement Gun Co. v. McGivern*, 218 Mass. 198; *Baush Mach. Tool Co. v. Hill*, 120 N. E. Rep. 188 [Mass.], July 16, 1918; *Smith v. Bowen*, 121 N. E. Rep. 814 [Mass.], February 4, 1919.)

What we have written declares sufficiently the clear and inescapable distinction between the facts and legal principles involved in this case and those involved in *Bossert v. Dhuy* (221 N. Y. 342).

The right of the plaintiff to a judgment being affirmed, the form or scope of the judgment rendered is not attacked.

The judgment should be affirmed, with costs.

HISCOCK, Ch. J., CHASE, CUDDEBACK, McLAUGHLIN and CRANE, JJ., concur; HOGAN, J., not voting.

Judgment affirmed.

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JOHN M. STODDARD, Appellant, *v.* MAUDE R. STODDARD,
Respondent.

Husband and wife — equity — agreement for separation — when courts have not jurisdiction to enforce provision of agreement that if circumstances should change, the amount to be paid by the husband should be decreased.

The plaintiff and defendant entered into a separation agreement which contained a provision to the effect that plaintiff should pay to the defendant sums named therein to be used for her support and maintenance and that of their children. In addition to these provisions it contained one which read as follows: "In the event that there should be any material change in the circumstances of either of the parties hereto either party hereto shall have the right to apply to any court of competent jurisdiction for a modification of the provisions herein regarding the amounts to be paid hereunder by the party of the first part (the husband) to the party of the second part hereto (the wife)." After making the payments provided in the agreement for several years plaintiff brought this action wherein he alleged in substance that his income had become greatly impaired and that of his wife considerably increased, that he was no longer able to make the payments in the agreement provided, and that the defendant insisted upon full payment and prayed relief that the amount required by him to be paid under the original terms of the agreement might be reduced and, if the court should determine that it was without jurisdiction to grant this relief, that it might be adjudged that the separation agreement was no longer in force and the defendant be enjoined from prosecuting any action thereunder against the plaintiff. Held, that the court cannot reform an agreement entered into by parties by making a new agreement or provision for them in the place of the one which they have deliberately adopted, and that its equitable powers cannot be invoked for the purpose of restraining enforcement by defendant of this contract unless there be some facts justifying such relief of which a court of equity could and a court of law could not take cognizance and that the presentation of the case shows no such fact. (*Kelso v. Kelly*, 1 Daly, 419; *Greenleaf v. Blakeman*, 166 N. Y. 627; *Joy v. St. Louis*, 138 U. S. 1, distinguished; *Johnson v. Johnson*, 206 N. Y. 561, followed.)

Stoddard v. Stoddard, 187 App. Div. 258, affirmed.

(Argued May 21, 1919; decided July 15, 1919.)

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APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 17, 1919, which reversed an order of Special Term denying a motion by defendant for judgment in her favor on the pleadings and granted said motion.

The following questions were certified: "1. Does the complaint herein state facts sufficient to constitute a cause of action? 2. Has the Supreme Court jurisdiction of the subject-matter of the action?"

The nature of the action and the facts, so far as material, are stated in the opinion.

Frederick E. Anderson for appellant. The Supreme Court is a court of competent jurisdiction within the meaning of the agreement. (*Pelz v. Pelz*, 156 App. Div. 765; *Ducas v. Guggenheimer*, 90 Misc. Rep. 191; 173 App. Div. 884; *Greenleaf v. Blakeman*, 25 Misc. Rep. 564; 40 App. Div. 371; 166 N. Y. 627; *Stanton v. Miller*, 58 N. Y. 200; *Joy v. St. Louis*, 138 U. S. 1; *Van Beuren v. Wotherspoon*, 12 App. Div. 421.)

A. M. Wattenberg and *William S. Bennet* for respondent. The Supreme Court has no jurisdiction of the subject-matter of the action. (*Curtis v. Albee*, 167 N. Y. 360; *Ramsden v. Ramsden*, 91 N. Y. 281; *Johnson v. Johnson*, 206 N. Y. 561; *Hughes v. Cumming*, 165 N. Y. 91.) Jurisdiction of the subject-matter cannot be conferred upon the court by consent. (*Benson v. Eastern B. & L. Assn.*, 174 N. Y. 83; *Meacham v. J. F. & C. R. Co.*, 211 N. Y. 346; *Matter of Caffrey*, 52 App. Div. 264.)

HISCOCK, Ch. J. The plaintiff and defendant, being husband and wife and then living apart, several years ago entered into a separation agreement which has been assumed to be valid. It contained many provisions of the general character usually found in such an agreement and amongst them those to the effect that plaintiff each

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month should pay to the defendant the sum of \$700, \$500 to be used for her own support and maintenance and \$200 to be expended by her for the support and maintenance of two children. In addition to these usual provisions it contained an unusual one which read as follows: "In the event that there should be any material change in the circumstances of either of the parties hereto either party hereto shall have the right to apply to any court of competent jurisdiction for a modification of the provisions herein regarding the amounts to be paid hereunder by the party of the first part (the husband) to the party of the second part hereto (the wife)."

After making the payments provided in said agreement for several years plaintiff brought this action wherein in addition to allegations of a formal nature and concerning the sufficiency of which no question arises, he alleged in substance that his income had become greatly impaired and that of his wife considerably increased, that he was no longer able to make the payments in the agreement provided and had attempted to procure his wife to accept those of a lesser amount but that she had refused so to do, insisting that she would bring actions from month to month to enforce payment of the sums mentioned in the agreement and that in fact she had already brought one or more of such actions. The separation agreement was set forth in full and upon the allegations stated and in reliance upon the clause which has been quoted he in substance prayed relief that the amount required by him to be paid under the original terms of the agreement might be reduced in amount and, if the court should determine that it was without jurisdiction to grant this relief, that it might be adjudged that the separation agreement was no longer in force and the defendant be enjoined from prosecuting any action thereunder against the plaintiff.

By demurrer the defendant has presented the question whether this complaint states a cause of action and with

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the answer given by the order appealed from that it does not we agree.

Originally there seems to have been considerable uncertainty and debate concerning the character to be ascribed to this action as bearing on the right of plaintiff to maintain it. Our consideration, however, is freed from the necessity for much of this discussion by the concessions now made and the position now assumed by the plaintiff.

It is conceded, as it undoubtedly otherwise must have been held, that this is not a matrimonial action or in the nature of a matrimonial action under the provisions of the Code to have the court decree a separation and fix an amount for the support and maintenance of the wife. The most cursory examination of the allegations of the complaint also shows that it was not brought as an action to have the agreement set aside as vitiated by fraud or misunderstanding and that it is not an action to have the instrument so reformed as to conform to an agreement actually made by the parties but through mistake not properly reduced to writing.

The plaintiff adopts as its character that of an action to enforce specific performance. He says that the contract comprehends the agreements: (1) "That upon a material change in the circumstances of either party the particular allowance specified in the contract shall no longer be paid." (2) "That from thenceforth the plaintiff should pay and defendant should accept such amount as the court should (ought to) prescribe according to its course and practice in matrimonial actions having in view the resources and income of the respective parties," and he, therefore, prays specific performance and enforcement of the contract on that interpretation.

It is to be noted that the plaintiff does not for any recognized reason in any manner directly or indirectly assail the agreement as a whole or ask that it be set aside. He simply asks that the court shall fix a new amount which

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shall be inserted in certain provisions of the contract as the amount thenceforth to be paid by plaintiff to defendant and in that respect make a new agreement for the parties. It is true that in the attempt to sustain the action on the theory of one of specific performance it is sought to extend the real purpose of this action. It is suggested that the court shall make a judgment fixing this new amount and compelling defendant thenceforth to accept it and the plaintiff thenceforth to pay it. These latter propositions in our judgment, however, amount merely to an attempt to extend by mere words what is the real and substantial purpose of the action. Plaintiff has no interest in an action to compel defendant to accept some money from him and he has no need for an action to compel himself to pay money to defendant, if he wants to. The real and only purpose is to have the court fix a new amount in the contract which the plaintiff will be bound to pay and which the defendant can collect if she wants to. If this amount is thus fixed the whole difficulty from plaintiff's standpoint is settled and there is no necessity for further provisions for specific performance of a contract which can be enforced at law.

Thus we come to the question already outlined whether the Supreme Court had jurisdiction to take hold of one of the provisions of this contract and determine the reasonable amount to be paid by one of the parties to the other and in that respect make a new agreement for them. We know of no principle and we have been cited to no authority which authorizes the court in this way in effect to write a clause in the contract for the parties. While the parties to this particular contract have attempted to agree that the court might exercise this jurisdiction it really is not claimed that that agreement confers upon the court powers which it does not inherently possess. It seems to us that this case is not other than it would be if two parties making a contract

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for the sale of real estate at a fixed price to be executed at some distant day, should provide that if conditions changed in the meantime the court should determine what would be a fair sum to be inserted in the contract as the purchase price of the real estate. We think that it would scarcely be claimed with seriousness that the court could do this even on an agreement of the parties and it does not seem that the present proposal is any different in its nature.

The cases which have been cited in behalf of the plaintiff do not in our opinion at all sustain his contention. Cases are called to our attention where an agreement for the renewal of a lease on a rental to be fixed by arbitration was liable to fail through the failure of the arbitration and where the court has enforced specific performance of the contract, relieving one party, through ascertainment of its own, from the failure of the other party to submit to arbitration or from the failure of the arbitrators properly to act. Of these cases that of *Kelso v. Kelly* (1 Daly, 419, 424) has become by citation a leading authority, but a full review of that case makes it very plain how different the facts therein involved were than those here presented to us. The parties had agreed on the renewal of a lease with an arbitration to fix the amount of the rental. That proceeding was a fundamental feature of the agreement and the defendant refused to appoint an arbitrator. As the court said: "But the plaintiffs cannot give the new lease until the amount of the rent is fixed, and as the defendant will not appoint an arbitrator, the plaintiffs are entitled to the equitable aid of the court to ascertain it — that being the only mode under the circumstances in which it can be ascertained and fixed," and, therefore, the court enforced specific performance of the agreement made by the parties ascertaining the amount which should have been fixed by an arbitrator whom, however, the defendant had refused to appoint.

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It did not make any new agreement for the parties or in an independent or original way act for them in fixing an amount as is asked here. It compelled action in accordance with an agreement and when one of the parties would not act it acted for him.

The case of *Greenleaf v. Blakeman* (25 Misc. Rep. 564; affd., as modified, 40 App. Div. 371; 166 N. Y. 627), relied on by plaintiff, is easily and clearly distinguishable from this case. There by a separation agreement the husband contracted to make certain payments for the benefit of the wife and that such payments should be secured by bond or by collateral, and when the husband refused to perform his contract by doing as he agreed to the court compelled him to act. It did not as an original proposition decide for the parties what would be a fair sum to be allowed for support or what would be a safe security to be executed by the husband conditioned for the payment of such support. It took the agreement which the parties had made and compelled performance of it.

The action of *Joy v. St. Louis* (138 U. S. 1), also greatly relied on by the plaintiff, is utterly unlike this case. In substance an agreement had there been made, as claimed, by a railroad corporation to allow certain trackage rights for a fair and equitable compensation. It or its successors refused to carry out its contract and by intervention in this action by the interested parties it was sought to compel it to do so. As a mere incident in the action to enforce specific performance the court determined what would be the fair and equitable compensation specified in the contract. That part of the relief was a mere incident to the general and fundamental relief which was sought of compelling the defendant to allow the use of its tracks, and the court merely fixed the figures which would express the agreement of the parties.

In our opinion the views expressed in *Johnson v.*

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Johnson (206 N. Y. 561) are applicable to and largely controlling of this case. In that action an application was made by the plaintiff, the wife, to compel the defendant to pay counsel fees *pendente lite*. A separation agreement had been made between the parties and the plaintiff sought to have the amount of the allowance therein provided largely increased on the ground that she had been induced by duress and other improper acts to execute the agreement. As in this case, no attempt was made to have the agreement as an entirety set aside but only to have the amount allowed for support increased. In determining whether the plaintiff was entitled to counsel fees the court viewed the case from two standpoints. In the first place it considered whether it was a matrimonial action in which such fees could be allowed and held that it was not such an one. It then went farther and held that on no possible view could counsel fees be allowed if the plaintiff did not state a cause of action and thus it arrived at the question whether the complaint, asking simply that a new amount be fixed by the court and inserted in the agreement which otherwise was allowed to stand, stated a cause of action and held that it did not. In answering this inquiry it was said in language which we think is presently applicable: "The question thus becomes whether where parties do enter into a separation agreement which provides as one of its features for an allowance to the wife, the court can annul this latter provision leaving the rest of the agreement intact, and then substitute its decision for the agreement of the parties as to the amount of allowance. It is very clear that this cannot be done. In the first place, the amount of allowance for support to be paid by the husband is so far an integral part of the agreement for separation that I doubt whether it could be set aside without annulling and cancelling the entire agreement. But beyond this the court cannot reform an agreement entered into by parties by making a new agreement or

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provision for them in the place of the one which they have adopted. (*Hughes v. Cuming*, 165 N. Y. 91, 96, 97.) ”

Under the second provision of the prayer for relief which has been quoted it is somewhat faintly urged that the court should retain jurisdiction of the action for the purpose of decreeing that payment at the existing rates should no longer be enforced, but we see no ground for relief of that kind. Obviously and independent of any other consideration the equitable powers of the court cannot be invoked for the purpose of restraining enforcement by defendant of this contract unless there be some facts justifying such relief of which a court of equity could and a court of law could not take cognizance, and on the present presentation of the case we perceive no such fact. If it be true as urged by plaintiff that the fair meaning of his contract with defendant is that he should pay the amounts thereunder provided so long as the situation of the parties continued without substantial change and that he should not be compelled to pay such amounts if his ability so to do became substantially impaired or the income of defendant became substantially larger, we see no reason why such meaning of the contract may not as well be urged as a defense to an action to collect under it as for the basis of an action to prevent collection under it.

We think that the order should be affirmed, with costs, and that both questions certified to us should be answered in the negative.

COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ., concur.

Ordered accordingly.

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**WILLIAM HOLMAN, Appellant, v. WALTER R. PATTEN,
Respondent.**

Commissions — agreement to pay brokerage fees to procurer of loan on real property and to furnish policy of title insurance — what constitutes failure to furnish policy — when broker entitled to commissions.

Defendant requested plaintiff's assignor to procure for him a loan on certain real property and agreed to furnish a policy of title insurance and pay brokerage fees and other expenses. The assignor procured a competent and willing lender. Defendant procured a preliminary agreement by a title insurance company to insure the title except that the policy proposed left one of the boundary lines of the property indefinite and undetermined. Because thereof the loan was not consummated. *Held*, that the insurance, in form, of the title to a plot of land, a boundary line of which is lacking, is not an insurance of the title, and that the title when so conditioned is not marketable; that defendant failed to perform the obligation on his part entitling him to the loan and that plaintiff is entitled to recover the amount of brokerage fees and expenses as stipulated.

Holman v. Patten, 170 App. Div. 877, reversed.

(Argued May 23, 1919; decided July 15, 1919.)

APPEAL from a judgment entered February 8, 1916, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiff entered upon a verdict directed by the court and directing a dismissal of the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

Harold E. Lippincott for appellant. The broker's contract had been duly performed and the compensation thereunder became due upon his procuring a lender on terms satisfactory to the defendant and upon the acceptance of the loan by the lender. (*Lederman v. Orecchinto*, 160 N. Y. Supp. 852; *Flannagan v. Fox*, 6 Misc. Rep. 132; *Tannenbaum v. Boehm*, 202 N. Y. 293.) The

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question of marketability of title in an action by a broker for his commissions in procuring a loan is immaterial, when a title policy as to such marketability was agreed to be furnished and was not furnished by the borrower. (*Flannagan v. Fox*, 6 Misc. Rep. 132; *Tannenbaum v. Boehm*, 202 N. Y. 293; *Smith v. Peyrot*, 201 N. Y. 210.)

Howard C. Taylor for respondent. The title of defendant was marketable and a policy containing the exception mentioned, which the title company was ready to issue, would have shown marketability. (*Haffey v. Lynch*, 143 N. Y. 241; *Title Guarantee & Trust Co. v. Fallon*, 101 App. Div. 187; *Heiberger v. Karfoil*, 202 N. Y. 419; *Greenblatt v. Hermann*, 144 N. Y. 13.) Plaintiff was obliged to prove that the failure of the proposed lender to make the loan was due to defendant's default. (*Crasto v. White*, 52 Hun, 473; *Ashfield v. Case*, 93 App. Div. 452; *Slawson & Hobbs v. Rafter*, 76 Misc. Rep. 199.)

COLLIN, J. The plaintiff seeks to recover, in virtue of a written contract between his assignor, William H. Hanford, and the defendant, agreed compensation for the procuring by his assignor a loan of money to the defendant. At the close of the evidence each party moved for the direction of a verdict. The trial court directed a verdict for the plaintiff, which was reversed and the complaint was dismissed by the Appellate Division.

There was in the evidence justification to the trial court for finding as facts: The defendant requested Hanford to procure to him a loan of twenty-five thousand dollars to be secured by a mortgage on his undivided one-half interest in land in the city of New York bounded on the east by East river. He agreed to furnish Hanford for the lender a "policy of title insurance from Lawyers' Title Insurance & Trust Company or Title Guarantee & Trust Company, showing that applicant's title is a

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marketable one and that this loan is a first lien on his one-half interest in said property," and to pay Hanford "for brokerage fees and other expenses $8\frac{1}{2}$ per cent on the amount of the loan." Hanford secured a competent and willing lender. The Lawyers' Title Insurance and Trust Company delivered to Hanford an agreement preliminary to and defining the terms of the policy it would issue. A part of it was: "A policy of insurance in the Company's usual form, insuring the title to" the property to be mortgaged will be issued by the company after the closing of the transaction "subject to all returns and requirements herein contained not disposed of, or complied with to the satisfaction of the Company. * * * Objections to title and matters for consideration and disposition before or at the time of closing title. * * * Outstanding title of the City of New York to any land lying east of the original high-water mark of the Harlem River." Obviously, this agreement did not, and the policy to be issued pursuant to it would not, disclose or fix the "original high-water mark of the Harlem River," or the eastern boundary line of the property to be mortgaged and the title to which was to be insured. It exempted or withdrew from the effect and security of the policy the land east of the original high-water mark of the Harlem river and did not define or place that water mark. It left, and the policy would leave, the eastern boundary line indefinite and undetermined. Subsequently the Lawyers' Title Insurance and Trust Company decided and declared that it would not insure the title to the property. The defendant did not furnish Hanford or the potential lender a policy of title insurance relating to the property other than the agreement we have described and because thereof the loan was not consummated. Hanford duly assigned to the plaintiff his claim under the agreement between him and the defendant.

The right of the plaintiff to recover the amount of

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brokerage fees and expenses stipulated by the defendant and Hanford to be paid the latter was established by the evidence. The defendant did not furnish Hanford or the willing and capable lender with the policy of insurance or an agreement to furnish the policy of insurance showing that the defendant's title to the plot of land to be mortgaged was a marketable title. The insurance, in form, of the title to a plot of land a boundary line of which is lacking is not an insurance of the title. The title to a plot of land so conditioned is not marketable. The plaintiff had no reason or cause to undertake to establish at the trial that the title was in fact unmarketable. The defendant was to furnish a policy of title insurance showing that it was. The defendant did not perform the obligation on his part entitling him to the loan. Hanford did fully perform the obligations entitling him to the agreed compensation and expenses.

The judgment of the Appellate Division should be reversed and that of the Trial Term affirmed, with costs to the appellant in the Appellate Division and this court.

HISCOCK, Ch. J., CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ., concur.

Judgment accordingly.

CHRISTOPHER BAUMANN, Appellant, *v.* THE CITY OF NEW YORK, Respondent.

Landlord and tenant — a tenant at will occupying and working land injured by the abstraction of water from the land for municipal purposes is entitled to the damages caused thereby — damages — evidence — when difference in amounts realized from crops before and after the trespass admissible upon the question of usable value.

1. As between a landlord and his tenant, the latter in the absence of some contractual provision to the contrary has an exclusive right to the control and possession of the leased premises and may defend such particular estate until the same has been legally terminated.

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2. Where both landlord and tenant sustain damages by the wrongful act of a third person, the law recognizes the right of each to maintain a separate action against the wrongdoer to redress his individual injury. (*Miller v. Edison Electric Illuminating Co.*, 184 N. Y. 17; *Bly v. Edison Electric Illuminating Co.*, 172 N. Y. 1, followed.)

3. The lands of a wife were, by her permission, worked by the husband, who received the entire income therefrom, the relation between the wife and husband as to the plot of land owned by the wife being that of landlord and tenant, the husband being a tenant at will. The defendant has maintained two driven well pumping stations near the premises so occupied by the plaintiff. The operation of the well abstracted and withdrew from the property in question and its soil a large part of the natural underground and percolating waters belonging to it, lowered the normal water table thereon from one to five feet, rendered the soil dry and unproductive, greatly injured its bearing qualities, and rendered the business of market gardening on the land much less profitable than before the wells were put in operation. *Held*, that the defendant was a continuous trespasser and as such invaded the possessory rights of the plaintiff, and for damage sustained to such usable value the plaintiff is entitled to redress. (*Sposato v. City of New York*, 75 App. Div. 304; aff'd., 178 N. Y. 583, distinguished.)

3. Evidence of the amounts realized from the crops before and after the trespass was proper for consideration upon the question of usable value as bearing upon the question as to whether or not the plaintiff had exercised proper judgment as a reasonable man in the management of the property in view of the changed conditions produced by defendant's trespass.

Baumann v. City of New York, 180 App. Div. 498, modified.

(Argued May 28, 1919; decided July 15, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 21, 1917, in so far as such judgment determines that plaintiff is not entitled to recover in this action certain damages on account of trespass upon land.

The facts found by the trial justice are in substance:

The plaintiff and one Johanna Baumann are husband and wife. On or about April 14th, 1908, the plaintiff

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by devise under the will of his father became the owner of a piece of land of about ten acres, and his wife Johanna Baumann under a devise in the same will became the owner of a piece of land of about ten acres adjoining the land of plaintiff on the south, the two pieces of land being separated by a ditch running east and west. Plaintiff has since April, 1908, occupied the ten-acre parcel belonging to his wife by her permission in connection with his own land for the cultivation of market garden crops the proceeds whereof have been received and retained by plaintiff with the consent of his wife.

Since 1906 the defendant has maintained two driven well pumping stations about twelve hundred feet distant from the premises of plaintiff and has used and operated said stations for the purpose of supplying water to the inhabitants of the city for household or other purposes for a consideration paid by consumers.

The soil of said property of plaintiff and his wife is naturally well supplied with ground water and moisture therefrom and is very fertile and is particularly well adapted to the growing of garden vegetables for market. Prior to the construction and operation of said driven well stations said property bore abundant crops and the business of market gardening thereon was profitable.

The operation of the well has abstracted and does abstract and withdraw from said property and its soil a large part of the natural underground and percolating waters belonging to the same, and has lowered and lowers the normal water table thereon from one to five feet, and has rendered and renders said soil dry and unproductive and has greatly injured the bearing qualities of seven acres of said property, four acres of which are in the parcel owned by the plaintiff and three acres of which are in the parcel owned by plaintiff's wife, and has rendered the business of market gardening on said

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land much less profitable than before said driven wells were put in operation.

The diminution in the usable value of said lands, caused by the abstraction of the water therefrom and the consequent lowering of the natural underground water table and the interference with capillary moisture has been two hundred dollars per acre for each of said seven acres of land for each of the years 1909 to 1915 both inclusive.

During the year 1916, defendant ceased the operation of the pumping stations, by which a large part of the natural moisture was restored to said lands.

As conclusions of law, the trial justice found: (1) Since February, 1906, and September, 1907, the city has been and now is a continuing trespasser. (2) Since April 14th, 1908, plaintiff has been a tenant at will of the property belonging to his wife. (3) Plaintiff is not entitled to recover damages to the usable value of any portion of the property belonging to his said wife and said damages belong to her as the owner of the fee of said land. (4) Awarded judgment to plaintiff for the sum of \$5,600 as plaintiff's past damages to the four acres for the years stated and granted an injunction restraining the operation of the driven well stations unless within a reasonable time defendant take proceedings to acquire by the power of eminent domain such property rights of the plaintiff as it may lawfully acquire.

Upon appeal to the Appellate Division, the third conclusion of law was modified by the Appellate Division so as to provide that the plaintiff was not entitled to recover *in this suit* any damages to the land of his wife of which he was tenant at will, and, as thus modified, the judgment was affirmed by a divided court.

The city does not appeal from that part of the judgment allowing plaintiff to recover damages to the four acres. Plaintiff appeals from such part of the judgment

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only as determines that he is not entitled to recover damages to the lands of his wife.

Charles Coleman Miller for appellant. Plaintiff is entitled to the damages to the southerly half of the farm owned by his wife. (*Dosoris Pond Co. v. Campbell*, 25 App. Div. 179; affd., 164 N. Y. 596; *McRoberts v. Bergman*, 132 N. Y. 73; 2 *McAdam on Landlord & Tenant*, 1065; 28 Am. & Eng. Ency. of Law [2d ed.], 523.) Plaintiff was entitled to recover these damages in this action as matter of law. (*Tiffany on Landlord & Tenant*, 118, § 13c; *Hayes v. City of Atlanta*, 1 Ga. App. 25.)

William P. Burr, Corporation Counsel (*Terence Farley* and *William E. C. Mayer* of counsel), for respondent. A lessee of premises located in the vicinity of the pumping stations, forming part of the water works system of the city of New York, whose lease was executed after the operation of such pumping stations had been commenced, cannot maintain an action against the city to recover damages occurring during the term of the lease because of the withdrawal of surface and sub-surface water from the leased premises incident to the operation of the pumps. (*Sposato v. City of New York*, 75 App. Div. 304; 178 N. Y. 583.)

HOGAN, J. The land owned by plaintiff's wife was by permission of the latter worked by plaintiff in connection with the plot of land owned by him and he received the entire proceeds of the two pieces of land. The relation between the wife and husband as to the plot of land owned by the wife was that of landlord and tenant, the plaintiff being a tenant at will. (*Harris v. Frink*, 49 N. Y. 24.) As between a landlord and his tenant, the latter in the absence of some contractual provision to the contrary has an exclusive right to the control and possession of the leased premises and may defend such particular estate until the same has been

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legally terminated. The tenancy of plaintiff never having been terminated, he was lawfully in possession of the three-acre plot of land and entitled to the annual product of the soil in the nature of emblements and for any injury inflicted by a wrongdoer resulting in a diminution of his enjoyment of the premises he would be entitled to redress. On the other hand, if the injury is one of a permanent character to the reversion, such as destruction of standing timber, etc., the right to recover for such wrong is vested in the landlord. Where both landlord and tenant sustain damages by the wrongful act of a third person, the law recognizes the right of each to maintain a separate action against the wrongdoer to redress his individual injury. (*Miller v. Edison Electric Illuminating Co.*, 184 N. Y. 17; *Washburn on Real Property* [3d ed.], sections 254, 255, 1517, 1519; *Bly v. Edison Electric Illuminating Co.*, 172 N. Y. 1.)

Counsel for defendant argued that the rule stated is inapplicable to the case at bar for the reason that the tenancy of plaintiff did not commence until April 14th, 1908, and the city having constructed and operated the pumping stations in 1906–1907, the trespass having been committed at that time, the tenant cannot sustain a cause of action therefor. In support of his argument reliance is placed upon the case of *Sposato v. City of New York* (75 App. Div. 304; affirmed by this court, 178 N. Y. 583).

In the *Sposato* case, the plaintiff was lessee of land for a term of five years commencing in 1898. The pumping stations from which the alleged damages resulted were erected in 1885–1894. The order in the *Sposato* case was made October 10th, 1902. On October 7th, 1902, we decided the *Bly* case sustaining the principle heretofore stated (172 N. Y. 1) and subsequent to our decision in the *Sposato Case* (178 N. Y. 583) we reiterated the rule of law in the *Miller Case* (184 N. Y. 17). A casual reading of the *Sposato* case might lead to a con-

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clusion that a conflict of decision existed. Such, however, is not the case. In the *Sposato* case the plaintiff alleged that the land in its natural condition and before the time of the acts complained of (1885-1894) were well saturated with water; that by the act of the city two wells had been dried up and the soil on the land had by the abstraction of water become so thoroughly dried up that it is comparatively worthless for the raising of crops and by reason of such diversion of water the plaintiff during the three years of his term of five years — which term had not expired — was deprived of his rightful use of the premises. The complaint did not allege the injury to or loss of any crops on the land during his possession of the same, and upon the opening of the case at Trial Term the complaint was dismissed on motion of counsel for the city, who argued in this court that upon the complaint the injuries sought to be recovered for were permanent to the fee and thereby vested in the landlord.

The complaint in the case at bar, while not as specific in expression as might be desirable, nevertheless alleged injury to the possession of plaintiff in that it asserts that the soil was by reason of the abstraction of the water therefrom made dry rendering the same less productive and profitable for garden purposes than before the wells were put in operation, which caused a depreciation in the usable value of the premises, and in substance the trial justice so found, and, as a basis for damages, found the diminution in the usable value of the land caused by the abstraction of water therefrom.

My view is that the principle stated in the *Bly* and *Miller* cases, cited, which are controlling in this case, is not in conflict with the *Sposato* case.

In *Reisert v. City of New York* (174 N. Y. 196) the plaintiff as owner and in possession of some eighty acres of land sought to recover damages as he alleged by reason of the act of the city through the construction of driven

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wells in rendering the soil of his land dry and worthless for cultivation and a stream on the land valueless for fish and game purposes. Upon the trial of that action, counsel for plaintiff contended that the plaintiff was entitled to recover his profits as such which he was able to prove during the six years prior to the commencement of the action, basing his argument upon the decision of this court in *Forbell v. City of New York* (164 N. Y. 522), which action was one by a lessee of land. An examination of that decision does not justify the argument made by counsel as was determined by us when the case reached this court, though counsel made the same argument here. In the *Reisert* case, counsel for the city argued that the plaintiff's recovery was limited to the loss in rental value which might be proved as resulting from the trespass and the main question treated by us was the correct measure of damages. The judgment below was reversed for errors on the trial, and we held that evidence of the rental or usable value of the premises was competent; that if the land was commonly rented the ordinary rentals received for the same would be admissible as well as testimony tending to show the nature of the soil, the character and extent of the use made of the lands, the nature of the business conducted thereon when in their normal or usual condition as to surface or subterranean waters and when deprived thereof was competent as proving or tending to prove usable value, and from such facts the court or a jury would be enabled to determine whether and to what extent the rental or usable value of the land as affected by the diversion of the water had been substantially injured.

We also held that in such a case profits as such were not recoverable; that a plaintiff suffering from a tort or trespass of another is bound, so far as he reasonably can, to reduce his damages, and that the plaintiff would not be justified in efforts year after year to raise crops upon this

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damaged land or portion thereof if experience had demonstrated that they would not mature and produce a marketable or profitable article.

In the present case the courts below held that the trespass was a continuing trespass; that by reason thereof the bearing qualities of the land had been affected and the usable value of the seven acres, four acres of which were owned by plaintiff and three acres of which he occupied as tenant, by reason of the trespass had been diminished two hundred dollars per acre for each of the years 1909 to 1915, both inclusive, but the damages awarded were limited for diminution in usable value to the four-acre plot.

To deny the plaintiff damages to the usable value of the three-acre plot of land was error. The defendant was a trespasser and as such invaded the possessory rights of the plaintiff and materially diminished the value of the use of the premises for the purposes for which the same were adapted and had been used. For damage sustained to such usable value the plaintiff was entitled to redress. (*Reisert v. City of New York*, 174 N. Y. 196.)

I do not deem it necessary to refer at length to the evidence adduced on the trial. My conclusion is that the evidence was ample to sustain the finding of the courts below that the diminution in the usable value of the premises was two hundred dollars per year.

The plaintiff produced evidence tending to show the nature of the soil of the land, the character and extent of the use made of the same and the nature of the business conducted prior to, during and subsequent to the commission of the trespass by the city, the extent of the crops raised, the prices received for the same in the market and the expenses incident to the cultivation and marketing of the same. While evidence of the amounts realized from the crops before and after the trespass

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was admitted, the record does not justify a presumption that such amount was adopted as a basis of damages by the trial justice. The evidence was proper for consideration by him upon the question of usable value and as to whether or not the plaintiff had exercised proper judgment as a reasonable man in the management of the seven acres in view of the changed conditions produced by defendant's trespass. Neither is it material that plaintiff sought injunctive relief as to the seven acres. He was granted such relief so far as the four-acre plot was concerned.

The judgment should be modified so as to provide that plaintiff recover of defendant the sum of \$9,800 instead of \$5,600 and, as thus modified, affirmed, with costs.

HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, McLAUGHLIN and CRANE, JJ., concur.

Judgment accordingly.

JONAS IWANAUSKAS, Respondent, v. PHILADELPHIA AND READING COAL AND IRON COMPANY, Appellant.

Master and servant — statute of Pennsylvania — negligence — when a duty imposed upon a foreman involves the exercise of judgment or discretion and he errs, the employer is not liable for injuries caused by the foreman's error.

Where plaintiff while working as a laborer in defendant's coal mine in the state of Pennsylvania, in which there was in force a statute requiring the foreman of every mine, or his assistant, to examine the places where the employees worked to see if they are safe and if unsafe to make them safe, called the attention of the assistant foreman of the mine, and two miners under whom he worked, to a loose rock in the roof of the mine where he was working, and the assistant foreman after examining the place said it was safe and directed plaintiff to go on with his work, and shortly afterward the rock fell upon plaintiff causing the injuries for which this action is brought, the question, under the decisions of the courts of Pennsylvania, whether the rock was secure was one that rested in the judgment of the mine foreman, or

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his assistant, and if they determined, as a matter of judgment, that it was secure, the defendant is not responsible for that conclusion, even if erroneous, and it was error for the trial court, in an action to recover for injuries sustained by plaintiff brought under the Pennsylvania statute, to deny defendant's motion for a nonsuit.

Iwanauskas v. P. & R. Coal & Iron Co., 180 App. Div. 925, reversed.

(Argued May 29, 1919; decided July 15, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 13, 1917, affirming a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

Pierre M. Brown for appellant. The Mining Law of Pennsylvania, as construed by the courts of that state, does not make defendant liable for the mistakes of judgment, or even the negligence of the mine foreman, when he is acting as mine foreman and discharging duties particularly assigned to him by the statute. (*L. V. Coal Co. v. Washko*, 231 Fed. Rep. 42; *Duskin v. Kingston Coal Co.*, 171 Penn. St. 193; *Peters v. Vesta Coal Co.*, 243 Penn. St. 241; *Vagaszki v. Consolidation Coal Co.*, 225 Fed. Rep. 913.)

O. H. Droege for respondent. The accident was caused by the negligence of the miners under whose direction plaintiff worked, and for whose negligence defendant was responsible. (*Counizzari v. Snyder*, 97 Atl. Rep. 477; *Kelly v. Bowers Co.*, 239 Penn. St. 558; *Holz v. Heinz Co.*, 247 Penn. St. 259; *Mingak v. Vesta Coal Co.*, 51 Penn. Sup. Ct. 584; *Molesky v. S. F. Coal Co.*, 247 Penn. St. 434; *Reeder v. L. V. Coal Co.*, 231 Penn. St. 563; *Wolcutt v. Erie Coal Co.*, 226 Penn. St. 204; *P. & R. Coal Co. v. Keshlusky*, 209 Fed. Rep. 197; *Andruises v. P. & R. Coal Co.*, 172 App. Div. 350;

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(*Martinkovics v. Lehigh Coal Co.*, 171 App. Div. 952; *Henry v. Hudson, etc., Co.*, 201 N. Y. 140.)

CUDDEBACK, J. The action is brought under the statute of the state of Pennsylvania, passed to provide for the health and safety of persons employed in the anthracite coal mines. (Anthracite Act of June 2, 1891.) The plaintiff seeks to recover for personal injuries incurred while working in the defendant's mine and alleges that the injuries were caused through the defendant's negligence.

The plaintiff was a laborer and he worked with a certified miner named Savicz. Both worked under another certified miner named Norkiewicz. Norkiewicz and Savicz were the superiors of the plaintiff and could direct him when and where to work.

The defendant's mine in which the plaintiff was employed is situated at Shenandoah, Pennsylvania, and is operated under the statute by a mine foreman and his assistants.

The statute relating to the mine foreman and his assistants provides as follows:

"Rule 12. The mine foreman or his assistant shall visit, and examine every working place in the mine at least once every alternate day, while the men of such place are or should be at work, and shall direct that each and every working place is properly secured by prop or timber, and that safety in all respects is assured by directing that all loose coal or rock shall be pulled down or secured and that no person shall be permitted to work in an unsafe place unless it be for the purpose of making it secure."

The courts of Pennsylvania have held in numerous cases that where this act places an obligation upon the mine foreman to see to or to do a particular thing, the execution of which involves the exercise of judgment or discretion, then his negligence in that regard cannot be imputed to the mine owner. (*Watson v. Monongahela*

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River, etc., Co., 247 Penn. St. 469; *Bigus v. Lehigh & W. Coal Co.*, 217 N. Y. 555.)

On the day when the accident happened in this case, July 14, 1917, the plaintiff and Savicz were engaged in driving a gangway through a vein of coal. As the gangway went forward, timbers were placed to support the roof and sides. Of course, the excavation was always somewhat in advance of the timber—at this time about nine feet. When the plaintiff and Savicz went to work at 7 o'clock in the morning they found that a rock in the roof of the gangway beyond the timber was "drummy," as they called it, or somewhat loose, and that water was running down from the roof. All this indicated that the rock would fall but how soon it would fall was the question.

Starr, the assistant mine foreman, had examined the gangway between 5 and 6 o'clock in the morning and had marked it as a safe place to work. During the forenoon Starr, the assistant foreman, visited the gangway again and his attention was called to the rock in the roof. He said that in his opinion it was safe enough to proceed with the work until they got the timber under, that is, until the timber reached a point under the rock.

Norkiewicz and Savicz also particularly examined the rock during the forenoon. They both concurred in the judgment of the assistant mine foreman that the rock would not fall before the timbering reached it.

The assistant mine foreman directed Savicz and the plaintiff to go on with the work. Norkiewicz also directed them to proceed. The plaintiff accordingly went to work under the rock and in the course of the afternoon the rock fell and the plaintiff was injured.

The plaintiff had a recovery at the Trial Term which was affirmed at the Appellate Division by a divided court.

The defendant moved at the close of the evidence to

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dismiss the plaintiff's complaint on several grounds, among others, that the question whether the rock was insecure or secure was one which rested in the judgment in the mine foreman or his assistant and they determine, as a matter of judgment, whether it was secure, and for that conclusion, even if erroneous, the defendant is not responsible.

The motion was denied and the defendant duly excepted.

It seems to me that the motion to dismiss should have been granted. The situation disclosed by the testimony here must be one of frequent occurrence in the working of mines. No defect was shown in the fixtures, machinery or tools furnished by the employer or in the entries or passageways of the mine, of which the employer should be deemed to have notice. There was simply a loose rock in the roof which must have been an ordinary incident in a day's work in the mine. It was a dangerous condition but the assistant mine foreman was the person to decide what to do under such circumstances. Rule 12 of the statute (*supra*) says the mine foreman or his assistant shall see that safety is assured with regard to loose coal or rock. It was a case where reliance might be placed upon the assistant mine foreman. (*Durkin v. Kingston Coal Co.*, 171 Penn. St. 193.)

The plaintiff's counsel argues that notwithstanding the expressed judgment of the assistant mine foreman that it was safe to proceed with the work until the timbering reached the rock, he qualified his judgment on cross-examination. He said in effect on cross-examination, there can be danger always when the water comes down. The water was coming down in this case. Hence the argument is that the place was dangerous and the direction or permission given to the plaintiff by Norkiewicz and Savicz to work under the rock was an act of negligence imputable to the defendant. I do not think the assistant mine foreman qualified his opinion. Furthermore, the

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testimony of both Norkiewicz and Savicz is that they concurred in the judgment of the assistant mine foreman that the rock would not fall before the timbering reached it. There was no evidence to contradict their statement. Under such circumstances their conduct forms no basis for a charge of negligence and does not deprive the defendant of the protection which the directions of the assistant mine foreman afforded.

I recommend that the judgment be reversed and the complaint dismissed, with costs in all courts.

HISCOCK, Ch. J., CHASE, COLLIN and CRANE, JJ., concur; HOGAN, J., dissents; McLAUGHLIN, J., not sitting.

Judgment reversed, etc.

MARY E. KELLY, Respondent, *v.* THE NASSAU ELECTRIC RAILROAD COMPANY, Appellant.

Negligence — evidence — when jury could not legitimately have inferred from the evidence facts essential to the verdict, the verdict cannot be sustained.

Plaintiff was a music teacher, fifty-eight years of age at the time of the accident. She was active on her feet and went about the city. While waiting for a street car, she walked up and down and in and out of a waiting car. A car starter employed by defendant called the approaching car and plaintiff started towards it. The starter came up behind and caught her arm. She says: "He helped me along towards the Fifteenth street car when he called out, 'Look out for the car' and dropped my arm, and I went down," breaking a leg. She adds: "He was a kind of support to me. I depended on him as long as he took hold of me." Upon this evidence, while the jury in an action to recover for injuries sustained by plaintiff may have guessed facts essential to the verdict, it could not legitimately have inferred negligence from the evidence; hence, the judgment for plaintiff cannot be sustained. (*Hanlon v. Central R. R. Co. of N. J.*, 187 N. Y. 73, distinguished.)

Kelly v. Nassau El. R. R. Co., 173 App. Div. 983, reversed.

(Argued June 3, 1919; decided July 15, 1919.)

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APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 2, 1916, affirming a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

D. A. Marsh and *George D. Yeomans* for appellant. No actionable negligence was proven. (*Mott v. Consumers Ice Co.*, 73 N. Y. 543; *Mulligan v. N. Y. & R. B. R. Co.*, 129 N. Y. 506; *Grimes v. Young*, 51 App. Div. 240; *Murphy v. Buckley-Newhall Co.*, 151 App. Div. 520; *Meehan v. Morewood*, 52 Hun, 568.) The trial justice erred in charging the jury, in effect, that if the starter attempted to help plaintiff across the street and then suddenly withdrew his arm, causing her to fall, the defendant was liable as a matter of law. (*Kellegher v. Twenty-fourth Street, etc., R. R. Co.*, 171 N. Y. 309; *Woods v. N. Y. & Q. C. R. R. Co.*, 128 App. Div. 235; *Johnston v. N. Y. C. R. R. Co.*, 128 App. Div. 456; *Goodkind v. Met. St. Ry. Co.*, 93 App. Div. 153.)

Vine H. Smith for respondent. The evidence warranted the conclusion that the defendant's employee, stationed at the point where the plaintiff was waiting to board one of defendant's cars, acted within the scope of his employment in assisting her to cross to the point at which she could board the approaching car; it also established that he was negligent in rendering such assistance and that such negligence was the direct cause of the accident. (*Hanlon v. C. R. R. of N. J.*, 187 N. Y. 73.)

POUND, J. This is an action to recover damages for personal injuries. Plaintiff was a music teacher, fifty-eight years of age at the time of the accident. She was active on her feet and went about the city. On the evening of February 13, 1914, she went to Ninth avenue and Nineteenth street in Brooklyn to take a Fifteenth

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street car on defendant's street railway. It was snowing at the time. While waiting for the car she walked up and down and in and out of a waiting car. A car starter employed by defendant called the approaching car and plaintiff started towards it. The starter came up behind and caught her arm. She says: "He helped me along towards the Fifteenth Street car when he called out, 'Look out for the car' and dropped my arm, and I went down," breaking a leg. She adds: "He was a kind of support to me. I depended on him as long as he took hold of me."

No other evidence of negligence is contained in the record and I think we must reach the conclusion that plaintiff failed to make out her cause of action. The trial court permitted the jury to find, in substance, that plaintiff was relying upon the assistance the starter was giving her in order to remain in an upright position and that she fell, as he should have foreseen, because his assistance was withdrawn suddenly and without warning.

In *Hanlon v. Central Railroad Company of New Jersey* (187 N. Y. 73), upon which plaintiff largely relies, a woman was alighting from a car at Jersey City. The last car step was eighteen or twenty inches above the platform. As she started to go down the car steps to the platform the conductor took her by the arm to assist her. She leaned on him. When she was in the very act of stepping from the last step to the platform he withdrew his support without warning and she fell. It was held that she could recover because the conductor undertook to assist her in alighting from the car and assisted her in a negligent manner. When the conductor suddenly withdrew his support, on which the passenger had good reason to rely, she was unstably balanced on the bottom step and her fall was the natural result of his inattention. But that case is not this case. Assuming without deciding that the starter was acting within the scope of his employment, it appears that he was, at the most, guiding plain-

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tiff a few steps in the direction of the approaching car. The plaintiff does not undertake to say that the support was suddenly or unexpectedly withdrawn or that she fell because it was withdrawn and such conclusions are a far inference from what she did say. She had no reason to expect that the starter would put her on the car. Whatever support he gave her necessarily would be withdrawn at some time before she reached the car. She was not in a precarious position where help was needed nor was she an infirm person who needed help. It does not appear that she was leaning heavily on the starter or that he had any reason to infer that she would fall if he released her arm, or that she had any reason to rely on further support at the time he let go of her arm. We are unable to understand how it could be found that the starter negligently caused her to fall. The jury may have guessed the facts essential to the verdict, but it could not have legitimately inferred them from the evidence.

The judgments should be reversed and a new trial granted, with costs to abide the event.

HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO,
McLAUGHLIN and ANDREWS, JJ., concur.

Judgments reversed, etc.

MORGAN L. STARKE, Appellant, *v.* S. C. BECKWITH
SPECIAL AGENCY, Respondent.

Service of process — execution — wages — personal service must be made upon employer, of execution directed against wages of employee, to make employer liable to the judgment creditor.

An execution directed against the wages or salary of a judgment debtor upon presentation to the employer becomes a lien to the amount specified upon the wages or salary of the employee as they become due. The employer must then pay the prescribed amount,

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and if he fails to do so he becomes liable to the judgment creditor. (Code Civ. Pro. § 1391.) Personal service of the execution is clearly contemplated. In this action against the employer, conflicting evidence was given upon this point on behalf of the respective parties, upon which a question of fact arose which the jury was entitled to pass upon. Hence it was error to dismiss the complaint.

Starke v. Beckwith Special Agency, 176 App. Div. 910, reversed.

(Argued June 4, 1919; decided July 15, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 5, 1917, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

The action is brought under the provisions of section 1391 of the Code of Civil Procedure to recover a percentage of the salary of one Charles T. Logan, an employee of the defendant-respondent.

The facts, so far as material, are stated in the opinion.

John Mulholland and *John H. Rogan* for appellant. The court erred in dismissing the complaint. (*Wood v. Morehouse*, 45 N. Y. 386; *T. H. Dept. v. Weil*, 134 N. Y. Supp. 1062.)

Franklin Taylor, *Joseph J. Zeiger* and *Morris Blau* for respondent.

ANDREWS, J. An execution directed against the wages or salary of a judgment debtor upon presentation to the employer becomes a lien to the amount specified upon the wages or salary of the employee as they become due. The employer must then pay the prescribed amount; and if he fails to do so he becomes liable to the judgment creditor. (Code of Civil Procedure, section 1391.) Mere knowledge on his part of the existence of an execution is not enough. To fix his liability the execution must be presented. And "presentation" implies some formality (*Ulster County Savings Institution v. Young*, 161 N. Y. 23, 33; *Niles v. Crocker*, 88 Hun, 312; *Willis v. Marks*,

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29 Ore. 493), especially where as here the "presentation" is to be made "by the officer to whom" it is "delivered for collection." Personal service of the execution is clearly contemplated.

A corporation, however, may be served only through its officers or agents. Often those on whom service may be made are defined by statute. If this is not done, an executive officer should be selected, or some agent whose ordinary duties are such that notice to him would naturally insure knowledge of the process to the corporation. (*Kansas City, Fort Scott & Memphis R. R. v. Daughtry*, 138 U. S. 298.)

In the case before us the complaint was dismissed on the ground that the plaintiff had failed to give any evidence of the presentation to the defendant of an execution against one Charles T. Logan, an employee of the defendant, directed to be collected out of his wages and salary. In this there was error. A deputy sheriff testified that he went to the office of the defendant and asked to see one of its officers; this was in the outer office; he was directed into an inner office and there he found a gentleman sitting at a desk; he told him that he was a sheriff's officer with an execution against Mr. Logan's wages and he handed it to him and he accepted it. The deputy then asked him who he was and he said he was an officer of the company. It further appears that there were but three officers of the defendant; a Mr. James T. Beckwith, its president and treasurer; a Mr. R. W. Beckwith, its vice-president, whose office, however, was in Chicago and who was there at the time, and a Mr. Flynn, its secretary. Mr. Flynn and Mr. James T. Beckwith each had private or inner offices separated from the outer or general office. There was still a third inner office but that was unoccupied. No one was allowed to occupy Mr. Beckwith's desk when he was away. Mr. Beckwith denies that the execution was ever presented to him. Mr. Flynn was not called. It further appears that

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after the date of the alleged presentation of this execution a check for \$40 was received by the sheriff of New York county, signed by the defendant and made to the sheriff's order. An explanation of this check is given by the defendant; but it is possible that this explanation might have been discredited by a jury.

Under these circumstances there was a question of fact upon which the jury was entitled to pass as to the presentation of the execution to the defendant.

The judgment appealed from should be reversed and a new trial ordered, with costs to abide the event.

HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDODOZ and POUND, JJ., concur; McLAUGHLIN, J., not sitting.

Judgment reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, *v.*
LEROY T. BRADFORD, Respondent.

Conservation Law — provision requiring all persons engaged in hunting to have a license — exception as to persons hunting on farmland owned, leased or occupied by them — complaint must allege that defendant did not come within exception.

The Conservation Law (Cons. Laws, ch. 65, § 185, subd. 1) requires all persons engaged in hunting to procure a license. By subdivision 8 of the section an exception is made as to persons hunting on farm land owned or leased and occupied by them. In this action to recover a penalty for violation of the statute, the complaint did not negative the fact that defendant was one of the persons within the description in the latter provision. *Held*, that it was necessary for the People in the complaint to negative the fact that defendant came within the exception, but that the burden will rest on the defendant to prove the existence or non-existence of the facts making the exception.

People v. Bradford, 178 App. Div. 371, affirmed.

(Argued June 4, 1919; decided July 15, 1919.)

APPEAL from a judgment entered May 7, 1917, upon an order of the Appellate Division of the Supreme Court in the third judicial department, reversing a judgment in

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favor of plaintiff entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

Merton E. Lewis, Attorney-General (W. T. Moore of counsel), for appellants. The court below erred in dismissing the complaint. (*Harris v. White*, 81 N. Y. 532.)

Frank Talbot for respondent. The Appellate Division was correct in its application of the rule of pleading resulting in a dismissal of the complaint. (*People v. Lupton*, 52 Misc. Rep. 336; *Molloy v. Village of Briar Cliff Manor*, 217 N. Y. 577; *People v. Stedeker*, 175 N. Y. 57; *Rowell v. Janvrin*, 151 N. Y. 60; *People v. Ebelt*, 180 N. Y. 470; *Harris v. White*, 81 N. Y. 532; *Dawson v. People*, 25 N. Y. 399; *People v. Kane*, 43 App. Div. 477; *People v. Spees*, 18 App. Div. 620; *People v. Stark*, 59 Hun, 51; 136 N. Y. 538; *People v. Levy*, 77 Misc. Rep. 556; *Bloodgood v. Mohawk & H. R. R. Co.*, 18 Wend. 9; *People v. Bailey*, 103 Misc. Rep. 366.)

HISCOCK, Ch. J. This action was brought to recover a penalty for the alleged violation of section 185 of the Conservation Law (Cons. Laws, ch. 65) by defendant through refusal to exhibit a license permitting him to hunt.

The provisions of the statute on which the prosecution rests and under which the question presented to us is to be decided provide as follows: "Hunting and Trapping License. Subdivision 1. *License required.* No person or persons shall at any time hunt, pursue or kill with a gun any wild animals * * * or engage in hunting or trapping except as herein provided without first having procured a license so to do * * *."

"Subdivision 8. *Exception.* Provided that the owner or owners of farm land, and their immediate family or families occupying and cultivating the same, or the

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lessee or lessees thereof and their immediate family or families who are actually occupying and cultivating the same, shall have the right to hunt, kill and take game * * * on the farm land of which he or they are the *bona fide* owners or lessees, during the season when it is lawful to kill and take the same, without procuring such resident license."

The plaintiff in its pleadings did not negative the fact that defendant was one of the persons described in the last provision of the statute and a motion having been made to dismiss the complaint as not alleging a cause of action the question has been and is presented whether with that failure it is sufficient. The determinative inquiry in this connection has been whether the provisions in favor of the persons described in the last quoted provision of the statute constitute an exception to the general scope of the statute or a proviso withdrawing them from the effect of the statute and thus constituting a defense to be pleaded. We think that they constitute, as in fact they are specifically labeled, an exception and that, therefore, it was necessary for the People in the complaint to negative the fact that defendant came within the exception. (*Rowell v. Janvrin*, 151 N. Y. 60; *People v. Stedeker*, 175 N. Y. 57, 67; *U. S. v. Cook*, 17 Wall. 168, 177.) This question has been so satisfactorily discussed in the opinion of Mr. Justice WOODWARD at the Appellate Division that we do not deem it necessary to consider it at farther length. We have deemed it useful, however, to consider the answer which we think may be made to the argument addressed to us in behalf of the People that if the provisions referred to constitute an exception which must be negatived by the complaint and the proofs a burden will be laid on the prosecution which it will be difficult for it successfully to carry. It is pointed out that the statute if construed as an exception names many circumstances as exempting a defendant from its operation which would be peculiarly within the knowledge of such defendant and which it

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would be almost impossible for the People to disprove. This is manifestly so and because it is so we do not believe that the plaintiff is compelled to go to the extent of both alleging and proving non-existence of the circumstances making the exception. On the other hand the rule seems to be fairly well established that in such a case as this while the plaintiff is obliged to plead non-existence of the exception the burden will rest upon the defendant, who has peculiar and almost exclusive knowledge of the existence or non-existence of the facts making the exception, to prove such facts if they do exist. While this rule is a somewhat arbitrary one it is practical and based on good sense and in our opinion is applicable to such a case as the present one. (1 Greenleaf on Evidence [13th ed.], §§ 78, 79; 1 Phillips on Evidence [4th Am. Notes with Cowen & Hill's Notes], p. 821; *Harris v. White*, 81 N. Y. 532, 548.) For these reasons we think the complaint was defective and that without discussing the other reasons urged therefor by the defendant, the judgment should be affirmed, with costs.

COLLIN, CUDDEBACK, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ., concur.

Judgment affirmed.

SENECA DISTRIBUTING COMPANY, Respondent, v.
KATHLEEN FULTON, Appellant.

Appeal — when reversal by Appellate Division "upon the facts" must be presumed to have been made upon the law.

Where the Appellate Division reversed a judgment entered upon findings made at Trial Term "upon the facts" without further specification, it must be conclusively presumed that the reversal was made upon the law in accordance with section 1338 of the Code of Civil Procedure.

Seneca Distributing Co. v. Fulton, 175 App. Div. 902, affirmed.

(Submitted June 4, 1919; decided July 15, 1919.)

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APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered January 19, 1917, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Joseph J. Reiher, Frank V. Smith and Peter P. Smith for appellant. There is no statement in the body of the order appealed from complying with section 1338 of the Code of Civil Procedure. It is a conclusive presumption, therefore, that the reversal of the Appellate Division was on a question of law. (*Levy v. Louvre Realty Co.*, 222 N. Y. 14; *Moore v. V. P. Cement Co.*, 220 N. Y. 320.)

Charles Goldzier and Benjamin A. Hartstein for respondent. Conceding that the order of reversal is not upon the facts within the purview section 1388 of the Code of Civil Procedure, this court would still have jurisdiction to review the judgment for the purpose of ascertaining whether the findings are supported by the evidence. (Code Civ. Pro. § 1337; *Perez v. Sandrowitz*, 180 N. Y. 397; *Otten v. Manhattan Realty Co.*, 150 N. Y. 395.) The eighth finding of fact which found Robert Fulton to be the plaintiff's agent, and the subsequent findings made upon that assumption are contrary to the undisputed evidence in the case. (*Powers v. Clarke*, 127 N. Y. 417; *Page v. Krekey*, 137 N. Y. 307; *W. N. Y. L. I. Co. v. Clinton*, 66 N. Y. 326; *Kelly v. Chrystal*, 16 Hun, 242; 81 N. Y. 619; *Dunfrey v. Dunfrey*, 14 App. Div. 108.)

CUDDEBACK, J. This case was tried before the court without a jury and the court made findings of fact and conclusions of law upon which judgment for the defendant was entered.

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The Appellate Division reversed the judgment and granted a new trial. The reversal was "upon the facts" without further specification in the judgment.

In its opinion the Appellate Division referred to certain findings of the Special Term as being against the evidence.

This is not in compliance with section 1338 of the Code of Civil Procedure, which says with regard to reversals at the Appellate Division: "it must be conclusively presumed that the judgment was not reversed, or the new trial granted, upon a question of fact, unless the particular question or questions of fact upon which the reversal was made or the new trial was granted are specified and referred to by number or other adequate designation in the body of the judgment or order appealed from."

The statements of fact referred to in the opinion of the Appellate Division are scattered through the findings of the Special Term and not designated as the Code requires. We have said that we are not inclined to extend our rulings farther than we have already gone in holding that the findings of the Trial Term may be reversed by implication at the Appellate Division. (*Beatty v. Guggenheim Exploration Co.*, 223 N. Y. 294.)

Therefore, we must conclusively presume that the reversal in this case was made upon the law, which involves the question whether there was any evidence to support the findings of the trial court.

The action was brought to foreclose a mortgage or lien upon land. Robert Fulton, the husband of the defendant, was a salesman employed by the plaintiff. He was short in his accounts and undertook to secure the plaintiff against loss by a mortgage from his wife upon the land in question, which was her property.

By misrepresentation he obtained from his wife the instrument sued on, which was delivered to the plaintiff, and the husband's time to make good his defalcation was extended. It was solely through the husband that the fraud upon the defendant was perpetrated.

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The trial court found that in making the misrepresentation to the wife and perpetrating this fraud upon her, Fulton, the husband, acted as the plaintiff's agent. That was the vital point in the defense.

A careful reading of the record fails altogether to show any evidence to support the finding that Fulton was the plaintiff's agent. The conclusion, therefore, is the same as that reached at the Appellate Division. It would not be necessary for the court to say anything in affirming the judgment except for the error in practice appearing in the judgment appealed from.

I recommend that the order appealed from be affirmed and that judgment absolute be granted against the defendant upon her stipulation, with costs in all courts.

HISCOCK, Ch. J., COLLIN, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ., concur.

Judgment accordingly.

BENJAMIN SALVIN et al., as Executors of HARRY SALVIN, Deceased, Appellants, v. MYLES REALTY COMPANY et al., Respondents.

Mortgage — guaranty — usury — when mortgage may be kept alive after payment thereof — guarantor of loan to a corporation cannot raise defense of usury — defense of usury in action to foreclose mortgage — when facts do not sustain such defense.

1. A mortgage, when paid, may be kept alive for other purposes, when the rights of creditors and third parties have not intervened.

2. Where a corporation is the primary debtor one who guarantees payment cannot interpose the defense of usury by reason of the express provision of the statute (General Business Law, § 374; Cons. Laws, ch. 20) since he stands in no better position than does the corporation.

3. This action was brought to foreclose a mortgage to which the defense of usury was interposed. On examination of the evidence, held, that there is no basis for the conclusion that the loan was made upon a usurious agreement.

Salvin v. Myles Realty Co., 177 App. Div. 886, reversed.

(Argued June 5, 1919; decided July 15, 1919.)

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APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 16, 1917, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Paul Armitage for appellants. The corporation, the Myles Realty Company, was the owner of the mortgage. It had acquired title more than sixteen months before the transaction in suit. The plaintiff loaned to it on the faith of its record title and the assurance that it owned the mortgage. There is no evidence that the mortgage was held by the corporation as a dummy for defendant Rieser, or that the plaintiff, before the loan, was made cognizant of that fact. (*Morton v. Thurber*, 85 N. Y. 550; *Guggenheimer v. Geissler*, 81 N. Y. 293; *Condit v. Baldwin*, 21 N. Y. 219; *Mutual Loan Co. v. Lynch*, 54 App. Div. 559; *U. S. Mortgage Co. v. Sperry*, 138 U. S. 313; *Stillman v. Northrup*, 109 N. Y. 473; *Booth v. Swezey*, 8 N. Y. 276; *Valentine v. Conner*, 40 N. Y. 248; *Matter of Consalus*, 95 N. Y. 340; *Matthews v. Coe*, 70 N. Y. 239; *Morris v. Talcott*, 96 N. Y. 100; *Haughton v. Burden*, 228 U. S. 161.) The corporation is forbidden to plead usury. A loan, therefore, to a corporation in place of an individual even though done with intent to avoid the objection of usury, is valid. The corporation is not used as "a cloak to conceal usury" but to legalize and validate the loan. If the borrower takes advantage of the special privileges and limited liability conferred by law upon a corporation, he cannot repudiate the limitation against pleading usury placed by law upon a corporation. (*Stewart v. Bramhall*, 74 N. Y. 85; *Rose v. Butterfield*, 33 N. Y. 665; *Union Estates Co. v. Adlon Const. Co.*, 221 N. Y. 183; *De Moltke-Huitfeldt v. Garner & Co.*, 145 App. Div. 766.)

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There was no usury in the transaction because the loan was part of a larger contract whereby Salvin advanced to Rieser \$15,000, surrendered a valid claim against him for \$2,100 with accumulated interest and discontinued, without costs, the pending litigation. (*Flagg v. Fisk*, 93 App. Div. 169; 179 N. Y. 590; *Spain v. Talcott*, 165 App. Div. 815; *Stillman v. Northrup*, 109 N. Y. 473; *Booth v. Swezey*, 8 N. Y. 276; *Valentine v. Conner*, 40 N. Y. 248; *Matter of Consalus*, 95 N. Y. 340; *Morris v. Talcott*, 96 N. Y. 100; *White v. Benjamin*, 138 N. Y. 623; *Weld on Usury*, 99; *Houghton v. Burden*, 228 U. S. 161; *Boswerts v. Kurghan*, 94 App. Div. 187.)

Joseph P. Segal and *I. Gainsburg* for respondents. The payment of usury was proven by clear and satisfactory evidence, and the transaction being concededly a loan, the lender cannot avoid the statute of usury by disguising the borrower and use a corporation as the dummy borrower, instead of the real party. (*Hall v. Eagle Ins. Co.*, 151 App. Div. 815; 211 N. Y. 507; *Grannis v. Stevens*, 216 N. Y. 583; *Schanz v. Sotscheck*, 160 App. Div. 798; 167 App. Div. 202; *Wyeth v. Braniff*, 84 N. Y. 627; *Fiedler v. Darrin*, 50 N. Y. 437; *U. S. v. Del. & Hud. Co.*, 213 U. S. 366; *Booth v. Bunce*, 33 N. Y. 139; *Anthony v. American Glucose Co.*, 146 N. Y. 407; *Cawthra v. Stewart*, 59 Misc. Rep. 38; *Gilbert v. Warren*, 19 App. Div. 403; *Schwarz v. Sweitzer*, 202 N. Y. 8; *Bliven v. Lydecker*, 130 N. Y. 102; *Spain v. Talcott*, 165 App. Div. 815.) The defendants are not estopped from setting up the defense of usury. (*Jacobus v. Jamestown Mantel Co.*, 211 N. Y. 162; *Baker v. Union Life Ins. Co.*, 43 N. Y. 283; *Bridger v. Goldsmith*, 143 N. Y. 424; *Mervin v. Romanelli*, 141 App. Div. 711; *Masten v. Olcott*, 111 N. Y. 153; *Empire Trust Co. v. Coleman*, 85 Misc. Rep. 312; *Public Bank v. Landau*, 147 N. Y. 738; *Schanz v. Sotscheck*, 167 App. Div. 302; *Silverstein v. Brown*, 153 N. Y. 677.)

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MCLAUGHLIN, J. This action was brought to foreclose a mortgage on an interest in real estate in the city of New York. The mortgage was for \$15,000, which had, by payments, been reduced so that at the time the action was commenced, there was only claimed to be due \$2,000 and interest. Two defenses were set up: (a) Usury; and (b) novation. The court at Special Term reached the conclusion that defendants had failed to establish the second defense, but had succeeded upon the first, and directed that the complaint be dismissed upon the merits. From the judgment entered to this effect an appeal was taken to the Appellate Division, where the same was affirmed, two of the justices dissenting. An appeal was then taken to this court.

The sole question presented upon the appeal is whether there is any evidence to sustain the finding that the mortgage sought to be foreclosed was the result of a usurious agreement. If so, the appellants must fail. The decision of the Appellate Division not being unanimous enables us to examine the record for the purpose of ascertaining that fact. (*Heskell v. Auburn L., H. & P. Co.*, 209 N. Y. 86; *Hickok v. Auburn L., H. & P. Co.*, 200 N. Y. 464.) Such examination discloses the following uncontradicted facts: That the Myles Realty Company is a domestic corporation, with 106 shares of stock, of which defendant Ely J. Rieser owns 104, his wife one and a third person one; that the business of the corporation, so far as appears, was to enable Rieser to take the title to real estate purchased by him in the name of the corporation, then to negotiate loans thereon, and otherwise to manage the same; that in May, 1908, Rieser was the owner of a lease of real estate on Fifty-ninth street in the city of New York; that on that day he borrowed \$15,000 from one Bates, for which he gave his bond, payable April 30, 1910, and as collateral security for its payment, gave a mortgage, in which his wife joined, on such leasehold interest; that when the loan fell

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due it was paid, but the bond and mortgage were not satisfied, but by agreement between the parties were kept alive and assigned to the Myles Realty Company; that the assignment was recorded and the record title to same was in the corporation from April 29, 1910, to September 1, 1911, when it was assigned and transferred by the realty company to Harry Salvin, plaintiffs' testator, as collateral security for a loan of \$15,000 made by him to it. The facts connected with the loan by Salvin were substantially as follows: Sometime prior to September 1, 1911, Rieser sold to Salvin the stock in a corporation and guaranteed that its debts did not exceed a certain amount. Subsequently Salvin claimed that the debts exceeded, by \$2,091.94, the amount which had been represented and he, therefore, demanded that Rieser pay him such sum. The demand being refused, an action was brought to enforce the claim. After issue was joined, the matter was sent to a referee to hear and determine. Several hearings were had, but before the case was finally closed, a settlement was arrived at by the terms of which Rieser paid \$1,000 to Salvin, the fees of the referee and stenographer, and Salvin loaned to the Myles Realty Company \$15,000, as collateral security for the payment of which the realty company assigned the bond and mortgage above referred to, also gave its bond, and Rieser and his wife gave their bond conditioned that if the realty company did not make the payments as provided, they would. Rieser also paid to Salvin, or to a third party for his benefit, \$1,000, for making the loan to the realty company.

After a careful consideration of the record I am unable to find any evidence to sustain the following findings:

(1) That when Bates was paid the amount of his loan the bond and mortgage, and the indebtedness covered thereby, were extinguished.

On the contrary, the mortgage was kept alive by agreement between the parties. This is clearly shown by the fact that a satisfaction was not given, but instead an

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assignment to the realty company. There is no doubt that a mortgage, when paid, may be kept alive for other purposes, when the rights of creditors and third parties have not intervened. (*Hoy v. Bramhall*, 19 N. J. Eq. 563; *James v. Morey*, 2 Cow. 246; *Bogert v. Bliss*, 148 N. Y. 194.) The assignment to the realty company put the title to the mortgage in it. The delivery of the mortgage, so assigned, at the instigation of the mortgagor, gave it a new vitality and in equity estopped him from asserting to the contrary.

(2) That the payment to Bates was made by Rieser and not by the realty company.

The fact that Rieser held nearly all the stock of the realty company did not destroy its legal entity nor prevent its performing legal corporate acts. It could make the payment to Bates and then, instead of having the mortgage satisfied, take an assignment. The assignment itself recites: "That I, Charles F. Bates * * * in consideration of the sum of Fifteen Thousand (15,000) Dollars * * * to me in hand paid by Myles Realty Company * * * the receipt whereof is hereby acknowledged," have sold, assigned, etc.

(3) That the realty company was a mere dummy and held the title for Rieser.

The realty company had held the title for upwards of a year. The assignment to it had been recorded and there is not a particle of evidence to indicate that it held such title other than for itself. Plaintiffs' witness, Armitage, testified, and his testimony was uncontradicted, that he told plaintiffs' testator, in the presence of Rieser, "It was an old mortgage on the premises; that it had existed there since 1908; that it had been assigned and was owned by the Myles Realty Company and that there was no question as to its validity."

(4) That the loan was made to Rieser and not to the realty company under a usurious agreement by which a bonus of \$1,000 was paid to the lender.

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The only basis for this finding is the fact that Rieser was president of the realty company, owned nearly all of its stock and that he paid to plaintiffs' testator a bonus of \$1,000 for making the loan. The fact that Rieser owned substantially all the stock of the company did not prevent its doing business as a corporation. It had the right to borrow money and if Rieser personally paid a bonus it did not in any way affect the transaction. Before the loan was made, at a stockholders' meeting duly called, a resolution was passed — two-thirds of the stockholders being present — authorizing the realty company to make the loan and to assign the mortgage as collateral security for its payment. The fact that Rieser guaranteed to pay the amount of the loan if the realty company did not, and to induce the making of the loan he paid \$1,000, did not, in my opinion, affect the transaction in the least. The realty company was in need of money. An action was pending against Rieser to recover upwards of \$2,000, which he ascertained could be settled for \$1,000, and in addition thereto a loan could be obtained by the realty company of \$15,000. It may very well be he thought this was a good way to end the litigation and obtain the money, but whether he did or not, his acts and purposes did not affect the assignment of the mortgage by the realty company. It received \$15,000. The check which the plaintiffs' testator gave for the loan was payable to the realty company's order and the same was collected by it. There is no evidence to show that the realty company was a party to any agreement by which a bonus was agreed to be paid, or that it paid any part of the bonus. It is well settled that to establish usury, evidence must be produced to show a corrupt intent by both the borrower and the lender. (*Hartley v. Eagle Ins. Co.*, 222 N. Y. 178; *White v. Benjamin*, 138 N. Y. 623.)

The loan was made to the realty company. It was the primary debtor. Rieser was a secondary debtor, having

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guaranteed to pay the loan if the realty company did not. By express provision of the statute the realty company could not interpose a defense of usury. (General Business Law, § 374, Cons. Laws, ch. 20.) Rieser stood in no better position than it did. (*Stewart v. Bramhall*, 74 N. Y. 85; *Union Estates Co. v. Adlon Const. Co.*, 221 N. Y. 183.)

There being no evidence to sustain these findings there is no basis for the conclusions of law that the loan was made upon a usurious agreement, and, therefore, void, and that the mortgage could not be enforced.

The judgments appealed from, therefore, should be reversed and a new trial ordered, with costs to abide event.

HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND and ANDREWS, JJ., concur.

Judgments reversed, etc.

GLOBE MALLEABLE IRON AND STEEL COMPANY et al.,
Appellants, v. NEW YORK CENTRAL AND HUDSON RIVER
RAILROAD COMPANY, Respondent.

Railroads — street crossings — negligence — action against railroad to recover damages arising from fire so far as they were enhanced by blocking of a street crossing by freight train.

1. As to travelers upon streets a railway necessarily has the right of way. But an emergency may arise which requires the temporary reversal of this rule. Knowing of such a condition the railway should yield what otherwise would be its rights. It should so manage its trains as not to increase the public hazard. A fair use of its tracks in view of its own interests and those of the public is what it is entitled to. Nothing more.

2. This action is brought to recover damages sustained by plaintiffs as the result of a fire so far as such damages were enhanced by the blocking of the streets of the city of Syracuse by defendant's trains so as to prevent a part of the fire department from reaching the scene of the fire. By reason of the delay, which it is claimed could have been readily avoided by defendant's servants, much greater damage was

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done by the fire than would have occurred had the fire department been able to reach the fire promptly. The plaintiffs recovered at Trial Term. The judgment entered thereon was reversed by the Appellate Division. On examination of the evidence, held, that the question whether the defendant made reasonable use of its rights in the street in view of the situation, presented a question for the jury.

Globe Malleable Iron & Steel Co. v. N. Y. C. & H. R. R. Co., 175 App. Div. 97, reversed.

(Argued June 5, 1919; decided July 15, 1919.)

APPEAL from a judgment entered April 16, 1917, upon an order of the Appellate Division of the Supreme Court in the fourth judicial department, reversing a judgment in favor of plaintiffs and directing a dismissal of the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

Edward Schoeneck and *Ernest W. Lawton* for appellants. The exclusive control of private property is subordinate to the exigencies of public safety and private necessity. The railroad company owed to the public in general a duty to so use its own property as not to do unnecessary injury to the property of another. (*Phænix Ins. Co. v. N. Y. C. R. R. Co.*, 122 App. Div. 113; 196 N. Y. 554; *American Sheet & Tin Co. v. Pittsburgh & L. E. R. Co.*, 143 Fed. Rep. 793; *Cleveland, etc., Ry. Co. v. Taner*, 96 N. E. Rep. 758; *Houren v. Chi., M. & St. P. R. Co.*, 236 Ill. 620; *Birmingham, etc., R. Co. v. Williams*, 66 So. Rep. 653; *Erickson v. Gt. Northern Ry. Co.*, 117 Minn. 308; *Bodkin v. Gt. Northern Ry. Co.*, 124 Minn. 219; *Clark v. Gr. Trunk R. Co.*, 149 Mich. 400; *Metalic, etc., Co. v. Fitchburg R. Co.*, 109 Mass. 277; *Little Rock Tr. Co. v. McCaskill*, 75 Ark. 183.) The judgment of the guilty party cannot be substituted for the rule of the reasonably prudent man by which all acts in negligence law are measured. (*Mertz v. Connecticut Co.*, 217 N. Y. 475; *McGuire v. Barrett*, 223 N. Y. 449; *Hoyt v. N. Y., L. E. & W. R. R. Co.*, 118 N. Y. 406.)

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Leroy B. Williams for respondent. Defendant is not liable for its failure to stop a moving freight train, and cut a crossing for firemen. (*A. S. & T. P. Co. v. P. & L. E. R. R. Co.*, 143 Fed. Rep. 789; *L. & N. R. R. Co. v. Scruggs*, 161 Ala. 97; *Vanderweile v. Taylor*, 65 N. Y. 341; *Bosch v. B. & M. R. R. Co.*, 44 Iowa, 402.)

ANDREWS, J. Steam railways with tracks on or across streets in the city of Syracuse owe some duty to the public. The street is still a street and is still devoted to street uses. Its legitimate function may not be unreasonably impaired. As to travelers upon it the railway necessarily has the right of way. But an emergency may arise which requires the temporary reversal of this rule. Knowing of such a condition the railway should yield what otherwise would be its rights. It should so manage its trains as not to increase the public hazard. A fair use of its tracks in view of its own interests and those of the public is what it is entitled to. Nothing more.

The tracks of the West Shore railroad enter Syracuse from the east. Parallel with them some fourteen hundred feet to the south is the Erie canal and some four hundred feet to the north, also parallel, is Burnet avenue, a paved street. From the canal to the north runs Greenway avenue. On its west side immediately south of the defendant's road is the plant of the Globe Malleable Iron and Steel Company. Seven hundred feet to the west Teall avenue also runs north from the canal and sixteen hundred feet further is Beach street crossing the canal by a bridge. South of the tracks a lane over the fields connects Beach street and Teall avenue. From an engine on the railroad the view of this lane is practically unobstructed. There is no other communication between the three north and south streets south of Burnet avenue. A traveler going towards the north, therefore, on either Beach street or Teall avenue can reach Greenway avenue only by way of Burnet avenue.

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At 4:50 A. M., on the morning of June 23, 1912, a fire broke out in the Malleable Iron Company's plant. At this time a freight train consisting of fifty-four cars and 2,160 feet in length was approaching on the West Shore tracks from the west. The engineer of this train, one Johnson, is now dead. But its fireman testified that he discovered the fire as he crossed James street some two miles away. When a mile distant he could locate it. Johnson had a regular train. On at least five or six trips he had been over the road in this neighborhood with the same fireman. We may assume that he knew the general situation and the communicating streets, for the general view towards the canal for much of the way was not obstructed by buildings or other obstacles. As the engine approached Beach street the tracks were straight and the engineer could see standing on the tracks ahead of him 150 feet east of Greenway avenue another freight train.

Meanwhile the fire department of the city of Syracuse was attempting to reach and extinguish the fire. One hose cart crossed the canal and came northerly on Beach street with its gong clanging. It was a still morning. There was not much noise on the engine. The gong could be heard for a distance of three or four blocks. The train was going slowly at from two to six miles an hour. It could have been stopped within thirty or forty feet. It did not stop, however, and the engine reached the crossing as the hose cart approached it. The firemen seeing that there would be delay; knowing that they could reach the fire only by means of Burnet avenue, turned to the right over the fields and so came to Teall avenue. Their course could be observed from the engine. Their object could have been divined. But when Teall avenue was reached the engine had just passed that crossing also and the hose cart was again blocked.

A second hose cart came south on Teall avenue to Burnet avenue. Its gong was also clanging as it turned

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easterly towards Greenway avenue. Between the two avenues it must have been slightly ahead of the engine, for as it turned south on Greenway avenue and came to the crossing the engine was just passing.

While between Teall avenue and Greenway avenue the engineer had been signaled from the freight train standing on the tracks ahead to stop. He shut off steam but almost immediately the first freight train began to move and he was signaled to follow. As the engine passed Greenway avenue the captain of the hose cart called to someone on the engine asking why they did not stop and let the hose cart by. That person's lips were seen to move apparently in reply but what he said was not heard. Again when the train was partly over the crossing someone upon it signaled to the engineer to stop, evidently with the idea of cutting the train and so allowing the hose cart to pass through. This operation would have taken two minutes. The engineer did not see or did not heed this signal, although there was not much smoke over the train to hide his view. Although he knew of the location of the fire and must have appreciated the need of haste he continued on slowly without stopping until the crossing was clear. No train was following him. A delay of fifteen minutes ensued. As a result much greater damage was done by the fire than would have occurred had the hose carts been able to reach the scene promptly. It is for this damage that the action is brought.

With evidence in the case which would justify a jury in finding such facts as have been here outlined the Appellate Division has held that the complaint should be dismissed. In this we think it erred. Whether the defendant made reasonable use of its rights in view of the situation which confronted it may well be a matter upon which men might differ. It knew the fire was serious; it knew of its location; at least, as its train neared Greenway avenue a conversation between the fireman

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and engineer shows it knew the fire department had not yet reached the scene; it knew that the department would attempt to do so and that haste was essential; it knew that this could only be accomplished through the crossing at Greenway avenue and that this crossing could be reached only from Burnet avenue. It had its train under control; it could have stopped in forty feet or a crossing could be cleared by cutting the train within two minutes. The jury might well say that its servants should have seen the hose cart coming north on Beach street; should have seen it as it turned easterly over the fields towards Teall avenue; should have realized what this attempt meant and should have left the Teall avenue crossing clear. They might say that these servants should have heard the second hose cart running easterly on Burnet avenue and realized that its only means of reaching the fire was by the Greenway avenue crossing and stopped before that crossing was reached. Or, if not, that having blocked that crossing they should have cut the train thereby diminishing the delay from fifteen minutes to two. We think that clearly here was a question of fact upon which the jury was entitled to pass.

The reversal by the Appellate Division is upon a question of law. We have examined the various exceptions to the admission or exclusion of testimony and to the charge and we find none that are material even if well founded. We do not discuss them in detail as to do so would unnecessarily lengthen this opinion.

The judgment of the Appellate Division should be reversed and that of the Trial Term affirmed, with costs in this court and in the Appellate Division.

COLLIN, CUDDEBACK, CARDOZO and POUND, JJ., concur; HISCOCK, Ch. J., concurs for reversal but votes for a new trial on the ground that errors were committed in rulings on the evidence; McLAUGHLIN, J., dissents.

Judgment accordingly.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel.
BARCALO MANUFACTURING COMPANY, Appellant, v.
WALTER H. KNAPP et al., Constituting the State Tax
Commission, Respondents.

Tax Law—franchise tax—in arriving at net income of a manufacturing corporation no deduction is to be made on account of excess profits tax paid by the corporation to the United States.

In fixing the net income of a manufacturing corporation for the purposes of the state franchise tax, "which income is presumably the same as the income upon which such corporation is required to pay a tax to the United States," no deduction is to be made of any excess profits tax which was included by the company in its return to the Federal government. (Tax Law, art. 9-A; L. 1917, ch. 726; L. 1918, ch. 276.) The term "net income" as used in the Federal statutes does not exclude the excess profits tax, but simply allows its deduction, by those who pay it, from their net income in arriving at the amount upon which their income tax is to be assessed. (Federal Statutes of 1916, ch. 463; Federal Statutes of 1917, ch. 63.)

People ex rel. Barcolo Mfg. Co. v. Knapp, 187 App. Div. 89, affirmed.

(Argued June 5, 1919; decided July 15, 1919.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered April 14, 1919, which dismissed a writ of certiorari and confirmed a determination of the state tax commissioners in assessing a franchise tax against the relator.

The facts, so far as material, are stated in the opinion.

Elon R. Brown and *Edward H. Letchworth* for appellant. If the State Franchise Tax Law is to be applied to the provisions of the Federal act of October 3, 1917, as indicated by the ruling of the state tax commission refusing to deduct income taxes paid within the year, it follows that the determination of the tax commission refusing to credit the excess profits taxes assessed for

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the year, as required by the same act, is erroneous and must be reversed. (*Am. Printing Co. v. Comm.*, 231 Mass. 237; *People ex rel. v. Comrs. of Taxes*, 95 N. Y. 554.) The excess profits tax must be deducted from the corporation's income in fixing the net income which is the basis of the state franchise tax, even though the state franchise tax continue to rest on the Federal act of September 8, 1916; and such deduction should be for the year for which the excess profits tax is assessed. (*Am. Printing Co. v. Commonwealth*, 231 Mass. 237.) Chapter 726 of the Laws of 1917, as amended, will be interpreted, so far as possible, to produce an equality of taxation on the corporations affected; and this principle will be applied both as to the terms of the act itself, so far as they are independent of Federal legislation, and the relation of the state act to the Federal acts. (*People ex rel. v. Commissioners of Taxes*, 95 N. Y. 554; *People ex rel. v. Lacombe*, 99 N. Y. 43; *Adee v. Nassau Electric R. R. Co.*, 72 App. Div. 404; *People v. Hilliard*, 85 App. Div. 507; *Staten Island Water Co. v. City of New York*, 144 App. Div. 318; *Roesenplaenter v. Roessle*, 54 N. Y. 262; *Donaldson v. Wood*, 22 Wend. 397; *Osborn v. N. Y., N. H. & H. R. R. Co.*, 40 Conn. 491; *East Livermore v. L. F. Trust & Banking Co.*, 103 Me. 418; *People v. Roberts*, 32 App. Div. 113.) The Appellate Division is in error in holding that the state Franchise Tax Law imposes a franchise tax based upon the "entire net income" of the corporation, instead of upon the income "upon which such corporation is required to pay a tax to the United States." (*People ex rel. v. Comrs. of Taxes*, 95 N. Y. 555; *Matter of Harbeck*, 161 N. Y. 211; *Sarlls v. U. S.*, 152 U. S. 570; *Matthews v. McStea*, 91 U. S. 7; *Lawrence v. People*, 188 Ill. 407; Endlich on Interp. of Statutes, §§ 43, 44, 47; *U. S. v. Freeman*, 3 How. [U. S.] 556; *Tiger v. Western Investment Co.*, 221 U. S. 286.)

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Charles D. Newton, Attorney-General (C. T. Dawes of counsel), for respondents. Our state legislation of 1918 did not alter the rule that the net income taxable under article 9-A was the figure "shown" or "reported" as net income in the last returns made to the United States. (*People ex rel. Parr v. Parr*, 121 N. Y. 679.) The sole purpose of the state legislation of 1918 amending article 9-A so as to make the net income taxable under our law "presumably" the same as the net income taxed by the United States and permitting corrections by the state tax commission for fraud, evasion or errors, was not to require the state tax commission to amend in every instance as a matter of law the figure showing the net income reported to the United States by deducting the income taxes paid and crediting the excess profits taxes paid to the Federal government, but simply to protect the constitutionality of our statute by making the assessment of net income under our state law a proceeding separate from the assessment of net income under the Federal laws. (*Stuart v. Palmer*, 74 N. Y. 183; *Overing v. Foote*, 65 N. Y. 263; *People v. Purdy*, 196 N. Y. 270; *People ex rel. Scott v. Pitt*, 169 N. Y. 521; *Ringlander v. Star Co.*, 98 App. Div. 101; 181 N. Y. 531.) The amendments of 1918 did not cut away the basis of assessment. Our state franchise tax was still to be computed on the "net income" of the corporation for the "preceding" year as "returned" to the Federal government. Errors or inaccuracies of fact could be changed (such changes as the Federal administrative authorities themselves could make), but the underlying method of arriving at net income found in the Federal laws which set forth specifically the deductions permitted from gross income, was still retained by our state law. Whatever was "net income" and was reported as such under Federal laws was basically the "net income" under our state law. (*Trustees of Village of Saratoga v. Saratoga Gas Co.*, 191 N. Y. 123; *People v. Klinck Packing Co.*, 214 N. Y. 131;

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People v. Beakes Dairy Co., 222 N. Y. 416.) It is not the general policy of the state to permit the deduction of Federal taxes before the computation of a state tax. (*Matter of Sherman*, 179 App. Div. 497; affd., 222 N. Y. 540; *Matter of Bierstadt*, 178 App. Div. 836; *Matter of Gihon*, 169 N. Y. 443; *Coe v. Errol*, 116 U. S. 517.) Chapter 628 of the Laws of 1919 clarified the expression "entire net income" so as to remove any doubt as to its meaning. The amendment was not a legislative declaration that the statute previous to 1919 meant something else. (*People ex rel. M. L. Ins. Co. v. Supervisors*, 16 N. Y. 424; *Roberts v. State of New York*, 30 App. Div. 106; *Rand v. Massachusetts Benefit Assn.*, 18 Misc. Rep. 336; *Weisberg v. Weisberg*, 112 App. Div. 231; *Sweet v. City of Syracuse*, 17 App. Div. 63.)

Ernest G. Metcalfe for William G. Wrigley, Jr. The state cannot in any manner, direct or indirect, nor by any name it sees fit to call the method, lay a tax on that which has become the property of or which the United States is entitled to receive by way of taxes assessed and payable. (*Van Brocklin v. State of Tennessee*, 117 U. S. 151.) The state uses the statement of net income as a basis or means of measuring the value of the franchise and a reduction in net income occurring after the making of the report to the United States or the state, caused by duly empowered legal authority, reduces the basis of computation of the value of the franchise, and must be considered and allowed for in the computation of the tax. (*People ex rel. Union Trust Co. v. Coleman*, 126 N. Y. 433.) The United States, having prior to the action of the state tax commission, taken a portion of what was net income, then, to the extent taken, the income ceased to be the property of the corporation, but immediately vested in the United States although payment was deferred and the state could not thereafter by any direct or indirect method tax the property of the United

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States nor require the corporation to pay a tax on the property of the United States. (*G. H. & S. A. Ry. Co. v. State*, 210 U. S. 217; *People ex rel. Mutual Trust Co. v. Miller*, 177 N. Y. 51; *People ex rel. J. W. S. Co. v. Tax Comrs.*, 196 N. Y. 39; *People ex rel. M. Ry. Co. v. Woodbury*, 203 N. Y. 231.)

COLLIN, J. The relator, a domestic manufacturing corporation, was by statute (Article 9-A of the Tax Law; Cons. Laws, chapter 60) obligated to pay for the tax year beginning November first, 1918, a franchise tax, "for the privilege of exercising its franchises in this state in a corporate or organized capacity," at the rate of three per centum of its net income or part thereof taxable within the state, determined as provided in the article (Sections 209, 215). Pursuant to the statute it duly transmitted to the state tax commission the report prescribed by the section 211. The report stated: "Net income for the calendar year ending December 31, 1917, as determined by the United States Treasury Department, \$204,172.75. * * * The net income of \$204,172.75, shown on the attached return, is the income upon which such corporation is required to pay a tax to the United States, and is computed as follows:

Total Net Income.....	\$256,201 75
Less Excess Profits Tax.....	52,029 00

Net income subject to tax by United States.....	<u>\$204,172 75</u>
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Said amount of \$204,172.75 is the only income of said corporation for said year 1917 upon which it is required to pay a tax to the United States." The state tax commission computed the tax to be paid by the relator upon the basis of its net income as being \$256,201.75. The refusal to credit upon this amount of income the amount of the excess profits tax assessed by the United States,

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namely, \$52029.00, constitutes the grievance of the relator.

On June 4, 1917, article 9-A (Laws of 1917, chapter 726, entitled "An act to amend the tax law, in relation to a franchise tax on manufacturing and mercantile corporations, and making appropriations for administration expenses"), in its original form took effect. On April 19, 1918, chapter 276 of the Laws of 1918, entitled "An act to amend the tax law, in relation to a franchise tax on manufacturing and mercantile corporations," took effect. It provided in effect that its amendments should take effect as of the date of the original act, June 4, 1917. Article 9-A as amended obligated the relator (and other domestic manufacturing corporations) to pay the annual franchise tax, to be computed by the tax commission upon the basis of "its net income" for the year, as thereafter provided "which income is presumably the same as the income upon which such corporation is required to pay a tax to the United States." (Section 209.) The rate of the tax is three per centum "of the net income" "determined as provided by this article." (Section 215.) "The corporations shall on or before each July first, or within thirty days after the making of its report of net income to the United States treasury department" for the year, transmit to the tax commission a verified report, of an elaborate, prescribed form and substance relative to its net income, containing as an item: "The amount of its net income for its preceding fiscal or the preceding calendar year as shown in the last return of annual net income made by it to the United States treasury department, and if the corporation shall claim that such return is inaccurate the amount claimed by it to be the net income for such period." The commission may require further reported information necessary for the computation of the tax. (Sections 211, 213.) "If the entire business of the corporation be transacted within the state, the tax imposed

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by this article shall be based upon the entire net income of such corporation for such fiscal or calendar year as returned to the United States treasury department, subject to any correction thereof for fraud, evasion or error, ascertained by the state tax commission." (Section 214.) If an obligated corporation does not make the report the commission may make an estimate of its net income. (Section 217.) On or before the first day of November in each year the commission shall compute the tax and notice the same to the state comptroller for collection. (Section 219-a.) "If the amount of the net income for any year of any corporation taxable under this article as returned to the United States treasury department is changed or corrected by * * * competent authority, such corporation, within ten days after the receipt of notice of such change or correction, shall make return under oath or affirmation to the tax commission of such changed or corrected net income, and shall concede the accuracy of such determination or state wherein it is erroneous. The tax commission shall ascertain, from such return and any other information in the possession of the commission, the net income of such corporation for the fiscal or calendar year for which such change or correction has been made by such * * * authority. * * * The tax commission shall thereupon reaudit and restate the account of such corporation for taxes based upon the net income for such fiscal or calendar year, such reaudit to be according to the net income so ascertained by the tax commission. * * *." (Section 219-d.)

The language of the statute expresses clearly the legislative intentions and enactments: The tax imposed was upon the entire net income of each year. This conclusion is repetitiously expressed and is indubitable. A definition of the words "net income" was not incorporated in the statute. The meaning given and characterizing them through and as used in the Federal

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statutes was their meaning as used in the state statute. The conditions and limitations, expressed in the Federal statutes, creating their office and effect under those statutes are adopted by the state statute. It used the term net income as established by the Federal statutes. While the net income is declared by the statute to be presumably the same as the income upon which the corporation is required to pay a tax to the United States, it is clear and certain that within the legislative intention the net income of the statute is that returned or reported to the United States in accordance with the Federal statutes. While the basis for the computation of the commission is the returned net income under the Federal statutes, the commission is free to fix, from the return and any other information, the true and correct amount of the net income, but not to change the nature or definition of it. The language of section 5 of chapter 276 of the Laws of 1918, which I have already stated, makes certain and mandatory the conclusion that the relator is governed and obligated by the provisions of article 9-A of the Tax Law existing and in force on November first, 1918. It is equally certain that those provisions were to be read and enforced, in so far as Federal statutes were involved, with the Federal statutes existing and in force on that date. In case section 209 of article 9-A had originally read as chapter 276 of the Laws of 1918 framed it, the net income returned to the United States in any year, if true and correct, would, in virtue of the statute, be the net income for that year under the state statute. The tax commission was given no power to change or correct it other than to make it as established by the then existing Federal statute, true and correct in amount. To hold otherwise would be to pervert legislative intention.

It remains for us to determine whether or not the term net income, within the meaning and effect of the Federal statutes, excludes the amount of any excess

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profits tax imposed by act of Congress and assessed for the year upon the taxpayer. Under the language of those statutes the problem is not difficult; the solution is not uncertain. It should be borne in mind that we are to reach the correct comprehension of the net income which those statutes require to be returned or reported to the United States treasury department, and not of the amount those statutes require the tax to be paid upon. The Federal statutes define the taxable net income as including gains, profits and incomes from manifold sources, subject only to such exemptions and deductions as they allow. (Act of 1916, ch. 463 [39 U. S. Stat. 756, 757], §§ 1 (a), 2; act of 1917, ch. 63 [40 U. S. Stat. 329], tit. 12, § 1200.) They state the exemptions they allow (Act of 1916, ch. 463 [39 U. S. Stat. 758, 761, 766], §§ 4, 7, 11; act of 1917, ch. 63 [40 U. S. Stat. 329], tit. 12, § 1200), and the deductions. (Act of 1916, ch. 463 [39 U. S. Stat. 759, 767], §§ 5, 12; act of 1917, ch. 63 [40 U. S. Stat. 330, 331, 335], §§ 1201, 1203, 1208.) Neither the exemptions nor the deductions include the income taxes or the excess profits tax. "The tax shall be computed upon the net income, as thus ascertained." (Chapter 463, §§ 8, 13; act of 1917, ch. 63 [40 U. S. Stat. 331, 335], §§ 1204, 1208.) The sections I have referred to have no relation to the excess profits tax. They relate to the income tax or the war income tax. Within them or within the other sections relating to those taxes it is not enacted that the net income to be returned is affected by or dependent in any way upon those taxes or the excess profits tax. Title 2 of chapter 63 of the act of 1917 (40 U. S. Stat. 302-308) provides for the excess profits tax. The discussion does not require consideration of it. The act of 1917 amended title 1 of the act of 1916 by adding to part 3, relating to general administrative provisions, six new sections (Act of 1917, ch. 63 [40 U. S. Stat. 336], § 1211), of which section 29 is: "That in assessing income tax the net income

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embraced in the return shall also be credited with the amount of any excess profits tax imposed by act of Congress and assessed for the same calendar or fiscal year upon the taxpayer, and, in the case of a member of a partnership, with his proportionate share of such excess profits tax imposed upon the partnership." This provision does not affect the definition of the words "net income" as established by the statute. It provides that in the case of the corporation, partnership or individual liable for the excess profits tax, the net income returned to the United States shall, in assessing the income tax upon that net income, be credited with the amount of the excess profits tax. The net income is not changed. A part of it equal to the sum of the excess profits tax is not, in such case, taxed. The corporations, partnerships or individuals who are not assessed the excess profits tax are assessed upon the net income for the income taxes. The net incomes of those who were and who were not assessed were ascertained under the same enactments and based upon identical specifications.

The return by the relator of its annual net income to the United States treasury department showed the annual total net income to be \$256,201.75. It was not inaccurate. The statute did not authorize the state tax commission to credit that net income with the sum of the excess profits tax assessed upon the relator or to assess the franchise tax upon the sum of it exceeding that tax.

The order should be affirmed, with costs.

CUDDEBACK, CARDOZO, POUND and McLAUGHLIN, JJ., concur; HISCOCK, Ch. J., and ANDREWS, J., dissent.

Order affirmed.

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HANS KARPELES, by JACOB KARPELES, His Guardian ad Litem, Appellant, *v.* MARIE C. HEINE et al., Respondents.

Elevators — Labor Law — provision that no child under sixteen years shall be employed or permitted to operate an elevator — action to recover for injuries of child injured while running an elevator — contributory negligence of child no defense, under express provision of statute.

1. Where a statutory prohibition is not a mere regulation or dependent upon some other fact, such as obtaining a certificate of the capacity of an infant, but is absolute and unqualified, its violation is in itself a basis of liability by an employer to a person who is injured as the proximate result of his employment contrary to the provisions thereof; and in a suit upon a cause of action thus given by statute, it is not necessary for the plaintiff to prove negligence on the part of the defendant, because the failure to observe the statute creates a liability *per se*, or, as is otherwise and with less accuracy sometimes said, is conclusive evidence of negligence.

2. The Labor Law (Cons. Laws, ch. 31, § 93) arbitrarily declares that "No child under the age of sixteen years shall be employed or permitted to have the care, custody or management of or to operate an elevator either for freight or passengers." In the case of an infant employed in violation of the direct and unqualified prohibition of the statute public policy requires that a recovery for injuries received by such a child in the course of his unlawful employment shall not be defeated by the very negligence, lack of care and caution that the statute was designed to prevent and make impossible, by prohibiting the employment of such a child in such a capacity. Hence contributory negligence on the part of the infant does not relieve the employer from liability.

3. Plaintiff, a boy less than fourteen years of age, living in a tenement house having an elevator, was permitted and directed by the superintendent of the building, in the place of the regular operator who was about to leave, to run the elevator to carry a workman to an upper floor where he was going to work. Upon the way back, plaintiff stopped at the second floor and left the elevator for some purpose, leaving the elevator door open. While he was absent the elevator moved upward and when plaintiff returned he walked through the open door, fell down the shaft and received the injuries for which the action is brought. The trial court left to the jury the question

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of the defendants' negligence, including their negligence arising from the violation of the Labor Law, and also the question whether the plaintiff was guilty of contributory negligence, charging the jury in substance that if the plaintiff was guilty of negligence materially contributing to the injuries received by him, he could not recover against the defendants. *Held*, error; that the plaintiff having been employed or permitted to run an elevator contrary to the express and unqualified prohibition of the statute an action for injuries arising in the course of such employment and as the proximate result thereof cannot be defeated by his contributory negligence.

Karpeles v. Heine, 180 App. Div. 375, reversed.

(Argued May 28, 1919; decided July 15, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 7, 1918, affirming a judgment in favor of defendants entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

Charles Caldwell for appellant. The court erred in charging that if the infant plaintiff was guilty of contributory negligence he could not recover. (*Gallenkamp v. Garvin Machine Co.*, 91 App. Div. 147; 179 N. Y. 588; *Kircher v. I. C. Mfg. Co.*, 134 App. Div. 144; 200 N. Y. 587; *Lee v. S. S. Mfg. Co.*, 134 App. Div. 123; *Lowry v. Anderson Co.*, 96 App. Div. 465; *Marino v. Lehmaier*, 173 N. Y. 534; *Koester v. R. C. Works*, 194 N. Y. 95; *Grady v. N. C. & C. Co.*, 153 App. Div. 405; *Welch v. Waterbury Co.*, 206 N. Y. 522; *Fitzwater v. Warren*, 206 N. Y. 358; *Johnson v. Fargo*, 184 N. Y. 379.)

Lawrence B. Cohen and *Jacob Schientag* for respondents. The court correctly charged the jury that if the infant plaintiff was guilty of contributory negligence he could not recover. (*Marino v. Lehmaier*, 173 N. Y. 534; *Koester v. Rochester Candy Works*, 194 N. Y. 95; *Stenson v. Flick Const. Co.*, 146 App. Div. 68; *Gelder v. Inter. O. T. Co.*, 150 App. Div. 184; *Bachman v. Little*, 152 App. Div. 811; *Orr v. Baltimore & Ohio R. R. Co.*, 168

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App. Div. 548; *Levberg v. Schumacher*, 173 App. Div. 640.)

CHASE, J. The plaintiff at the times herein mentioned was a boy about two months less than fourteen years of age, living with his father and mother on the sixth floor of a tenement house, and is described as "very healthy and very smart." The house contained twenty-four apartments and the owners maintained therein an elevator for the use of the tenants. They also employed a superintendent who had authority to employ a person to run the elevator for them. The plaintiff frequently rode on the elevator, and at times sought to manipulate the crank constituting the controller thereof. On the night before the day of the accident the boy employed by the superintendent, and in charge of the elevator, notified him that he was going to leave, but his services were continued until noon of the day of the accident.

About eleven o'clock on that day there was about and near the elevator, which was standing with open door at the ground floor of the building, the superintendent, the boy who was about to leave the employ of the defendants, a boy who had called to make application for employment to run the elevator, and the plaintiff. While they were so in the hallway of the ground floor, a man who had for a long time prior thereto been employed by the tenants in the building as a window cleaner came in and entered the elevator. The plaintiff ran into the elevator and said that he would take the man up to the floor to which he was going, but the man refused to go with him. The superintendent then, referring to the plaintiff and his running the elevator, said that it was all right, and the jury could have found that he had that morning expressly told the plaintiff to take charge of the elevator. What occurred thereafter is shown by the statements of the appellant's counsel made at the opening of the trial as follows:

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"He took the window cleaner up to the third floor and evidently must have come back to the second floor and gotten out of the elevator for some purpose and then when he went back into the elevator, the elevator having left in the meantime, he fell down the elevator shaft two flights to the basement."

The window cleaner testified that the plaintiff took him to the third floor and opened the door and that he (the window cleaner) immediately left the elevator and entered an apartment and did not know of the accident until some time thereafter. While those remaining in the ground floor hallway were waiting, they heard a noise and thereupon investigated and found that the elevator shaft doorway on the second floor was open and that the elevator was slowly moving upwards on its way to the top of the building. The plaintiff was found on the floor of the basement seriously injured. The elevator was subsequently found at the sixth (top) floor. The door leading from the elevator shaft to the hallway on the sixth floor and all other doors except that on the second floor were closed. There is evidence that the elevator had for some reason from time to time slowly moved upwards from the position in which it had been left, the same as it did on the day of the accident to the plaintiff.

The plaintiff testified that he did not remember about the accident except that he remembers opening the elevator door and going out.

The question of the defendants' negligence, including their negligence arising from the violation of section 93 of the Labor Law (Chapter 31 of the Consolidated Laws), and also the question whether the plaintiff was guilty of contributory negligence, were left to the jury and it found a verdict for the defendants.

The question is presented on this appeal whether it was error for the court to charge the jury in substance that if the plaintiff was guilty of negligence materially

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contributing to the injuries received by him, he cannot recover against the defendants.

Apart from recent statutes the rule is quite universal that one cannot recover for personal injuries arising from the negligence of a third person where they were caused in part by the negligence of the person injured. At common law contributory negligence of a person injured is a bar to a recovery of damages alleged to have been caused by the negligence of another.

Except where a child is so young as to be incapable of exercising judgment or discretion the law of contributory negligence applies when the person injured is an infant the same as when he is an adult, although the age, judgment, intelligence and experience of the child must be taken into account in determining whether he was negligent. (*Ihl v. Forty-second Street, etc., R. R. Co.*, 47 N. Y. 317; *Honegsberger v. Second Ave. R. R. Co.*, 1 Keyes, 570.)

A person under the age of sixteen years has not the experience or mature judgment of an older person. The statute arbitrarily declares that "No child under the age of sixteen years shall be employed or permitted to have the care, custody or management of or to operate an elevator either for freight or passengers." (Sec. 93.) The prohibition is without qualification or condition. It was enacted to wholly prevent a person of such immature age from running an elevator and exposing himself to the danger incident thereto and at the same time to relieve persons who are carried on an elevator from the danger which would result from committing the care, custody, management or operation of the elevator to a person under sixteen years of age.

It is based upon the legislative determination that a person under sixteen years of age has not the experience, judgment or caution required of one who is to assume the care, custody, management or operation of an elevator.

The employment of a person under sixteen years of

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age to run an elevator is unlawful. Where a statutory prohibition is not a mere regulation or dependent upon some other fact, such as obtaining a certificate of the capacity of an infant, but is absolute and unqualified, its violation is in itself a basis of liability by the employer to a person who is injured as the proximate result of his employment contrary to the provisions thereof. In such a case the liability is *per se*. (*Amberg v. Kinley*, 214 N. Y. 531; *Koester v. Rochester Candy Co.*, 194 N. Y. 92.)

"In a suit upon a cause of action thus given by statute, it is not necessary for the plaintiff to prove negligence on the part of the defendant, because the failure to observe the statute creates a liability *per se*, or, as is otherwise and with less accuracy sometimes said, is conclusive evidence of negligence. (*Jetter v. N. Y. & H. R. R. Co.*, 2 Abb. Ct. App. Dec. 458; *Racine v. Morris*, 201 N. Y. 240; *Watkins v. Naval Colliery Co.*, L. R. [1912] App. Cas. 693; 27 Halsbury's Laws of England, 192.)

"Whether a statute gives a cause of action to a person injured by its violation, or whether it is intended as a general police regulation and the violation made punishable solely as a public offense, 'must to a great extent depend on the purview of the legislature in the particular statute and the language which they have there employed.' (*Atkinson v. New Castle & Gateshead W. W. Co.*, L. R., 2 Exch. Div., 441; *Taylor v. L. S. & M. S. R. R. Co.*, 45 Mich. 74.)

"Actions to recover damages for the breach of a statutory duty are not to be confounded with those based solely on negligence. In the latter class of cases the violation of a statute or an ordinance, if it has some connection with the injuries complained of, is evidence more or less cogent, of negligence which the jury may consider with all the facts proved." (*Amberg v. Kinley, supra*, p. 535.)

Liability for injuries to a child in the course of his

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employment contrary to the provisions of a statute which says in substance that he shall not under any circumstances be so employed arises from the disobedience of the statute and the purpose and intent thereof. (*Koester v. Rochester Candy Co., supra*.)

In the case of an infant employed in violation of the direct unqualified prohibition of the statute public policy requires that a recovery for injuries received by such a child in the course of his unlawful employment shall not be defeated by the very negligence, lack of care and caution that the statute was designed to prevent and make impossible, by prohibiting the employment of such a child in such a capacity. (*Strafford v. Republic Iron & Steel Co.*, 238 Ill. 371; *Stehle v. Jaeger Automatic Machine Co.*, 220 Penn. St. 617; S. C., 225 Penn. St. 348; *Inland Steel Co. v. Yedinak*, 172 Ind. 423.)

The statements made herein as to the liability of the employer rest upon the unqualified prohibition of the statute against employing a person under sixteen years of age and are not intended to extend to other cases to which the reasoning herein does not fairly apply.

Where a person under sixteen and over fourteen years of age is employed for certain purposes without the certificate required by statute (Labor Law, secs. 162 and 163) it has been held that his contributory negligence will defeat a recovery for injuries incurred while so employed. (*Fortune v. Hall*, 122 App. Div. 250; affd., 195 N. Y. 578.)

The failure of an employee to obey the statute directing in regard to machines and machinery and the employment of labor, while some evidence to go to a jury on the ground of negligence, does not preclude evidence of contributory negligence on the part of the person injured.

In *Amberg v. Kinley* (*supra*) this court held that the failure to put fire escapes on a factory is conclusive evidence of negligence on the part of the employee who was lawfully employed. Yet if an employee was negligent

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and such negligence contributed to his injuries, he could not recover because of the violation of the statute relating to fire escapes. The employment in that case was not in itself illegal or contrary to express prohibition. In no case is the negligence of the employer necessarily sufficient to sustain a recovery for there always remains the question whether the employment was the proximate cause of the injury. It is claimed by both parties hereto that this court has decided in accordance with their claims respectively in regard to contributory negligence of a child employed in violation of the statute. The principal cases in this court cited by the parties are as follows: *Marino v. Lehmaier* (173 N. Y. 530); *Gallenkamp v. Garvin Machine Co.* (91 App. Div. 141; reversed, on dissenting opinion in Appellate Division, 179 N. Y. 588); *Koester v. Rochester Candy Co.* (194 N. Y. 92, 95); *Kircher v. Ironclad Mfg. Co.* (134 App. Div. 144; affd., 200 N. Y. 587).

In *Marino v. Lehmaier* (173 N. Y. 531) the plaintiff was employed in violation of a statute. (Laws of 1897, chap. 415, sec. 70.) He was injured while engaged in cleaning a feeder of a printing press. He brought an action to recover his damages but was nonsuited. On appeal the Appellate Division reversed the judgment of the trial court and granted a new trial. On appeal to this court therefrom judgment was ordered for the plaintiff on the stipulation given on taking the appeal. In the prevailing opinion in this court it is said:

“That a child under the age specified presumably does not possess the judgment, discretion, care and caution necessary for the engagement in such a dangerous avocation and is, therefore, *not as a matter of law* chargeable with contributory negligence or with having assumed the risks of the employment in such occupation.” (p. 534.)

Whether a finding of fact by a jury that the plaintiff

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was guilty of contributory negligence in connection with the accident would have defeated his recovery was not involved in the Appellate Division or in this court.

In *Gallenkamp v. Garvin Machine Co.* (91 App. Div. 141) the plaintiff was over fifteen and under sixteen years of age and was injured while engaged in putting tools into a conveyor consisting of an endless chain carrying metallic pans upon which the tools were placed. He brought an action for his damages. His complaint was dismissed at the Trial Term. At the Appellate Division it was held that the question whether the conveyor was a dangerous machine and whether the plaintiff was guilty of contributory negligence were for the jury and reversed the judgment of the Trial Term and granted a new trial. In the Appellate Division two of the judges dissented and in the dissenting opinion it was held that the plaintiff being over fifteen years of age was not employed in violation of the statute unless the plaintiff was at the time of the accident engaged in operating a dangerous machine. The dissenting judges further held that the accident happened, not because of a violation by the defendant of any duty which it owed the plaintiff either under the Labor Law or otherwise, but by a voluntary and unnecessary exposure by the plaintiff. On appeal to this court (*Gallenkamp v. Garvin Machine Co.*, 91 App. Div. 141; 179 N. Y. 588) the judgment of the Appellate Division was reversed and the judgment of the Trial Term affirmed on the dissenting opinion in the court below. In that opinion it was said: "In relation to the employment of minors, section 70 provides that 'A child under the age of fourteen years shall not be employed in any factory in this state.' This is a positive prohibition a violation of which is a misdemeanor (Penal Code, § 3841, now § 1275) and is evidently based upon the assumption that no child under the age of fourteen years is competent to work in a factory without danger to the child or the co-employees * * * and in such case negligence of the

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child in operating machinery which caused the injury would not defeat the cause of action. It is the employment of a child in a factory in violation of the statute that is the wrongful act which imposes the liability; and unless the minor can be said by his negligence to have contributed to the act of employment *the question of contributory negligence is not involved.*" (p. 147.)

In *Koester v. Rochester Candy Works* (194 N. Y. 92) the plaintiff was an infant under the age of fourteen years and it was claimed that he had been employed in violation of section 70 of the Labor Law and had been injured while so employed. He brought an action for damages and recovered in the trial court. The judgment thereon was affirmed in the Appellate Division. On appeal to this court it is said the Labor Law makes a violation of its provisions a misdemeanor nevertheless a violation of the statute is *per se* evidence of negligence for which a jury may find the defendant liable. It does not appear that the question of contributory negligence was considered, but the court held that the judgment should be reversed because of error in the refusal of the court to charge that if the plaintiff falsely stated his age to the officers of the defendant and led them to believe that he was actually over fourteen years of age at the time he was hired and they were justified in that belief they were not guilty of negligence in hiring him.

In *Kircher v. Ironclad Mfg. Co.* (134 App. Div. 144; affirmed without opinion, 200 N. Y. 587) the plaintiff was between fourteen and fifteen years of age and was employed in a mercantile establishment without procuring a certificate from the health authorities as provided by section 162 of the Labor Law. He was killed and an action was brought by his administrator which resulted in a verdict for the plaintiff which was affirmed by the Appellate Division and by this court. In the prevailing opinion it is said that it is strongly urged by the defendant that a nonsuit should have been granted for the reason

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that there was no evidence showing that the deceased was free from contributory negligence, and in a dissenting opinion it is said: "To affirm the order denying a motion for a new trial in this case we must be prepared to hold that the mere fact of employment contrary to the provisions of the Labor Law is conclusive evidence both of defendant's negligence and the freedom from contributory negligence of plaintiff's intestate." (p. 148.) In considering that case it must be borne in mind also that the plaintiff's intestate was not employed in violation of an unqualified prohibition against the employment.

The exact question now before us, although several times presented in the Appellate Division, has never been directly or necessarily decided by this court. It is open for an authoritative statement at this time and we hold that the plaintiff having been employed or permitted to run an elevator contrary to the express and unqualified prohibition of the statute can action for injuries arising in the course of such employment and as the proximate result thereof cannot be defeated by his contributory negligence.

The judgments should be reversed and a new trial granted, with costs to abide the event.

HISCOCK, Ch. J., COLLIN, CUDDEBACK, HOGAN,
McLAUGHLIN and CRANE, JJ., concur.

Judgments reversed, etc.

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In the Matter of the Accounting of EUGENE L. BUSHE et al., as Surviving Trustees under the Will of FREDERICK T. ADAMS, Deceased, Appellants.

THOMAS H. LOW et al., as Executors of ALPHEUS C. DWIGHT, Deceased, et al., Respondents.

Surrogates' Courts — testamentary trustees — commissions of deceased trustee — surrogate or Supreme Court has discretionary power to award or withhold commissions for services rendered by trustee before his death.

1. No distinction should be made between the powers of the Supreme Court and those of the surrogate in dealing wjth the compensation of a testamentary trustee.

2. The surrogate in settling the accounts of trustees of an estate allowed the executors of the will of a deceased trustee compensation for his services up to the time of his death as a co-trustee. A modification by the Appellate Division consisted in increasing the allowance to the full amount of commissions for receiving trust property as fixed by section 2753 of the Code of Civil Procedure. The order states that the estate of the deceased trustee was entitled to this modification as a matter of right and not as a matter of discretion. *Held*, that the surrogate or Supreme Court has discretionary power and may award or withhold commissions in certain cases; and under circumstances such as here existing, may allow such sum as is reasonable for the services of a deceased trustee, not exceeding the statutory percentage.

Matter of Bushe, 183 App. Div. 834, reversed.

(Argued May 26, 1919; decided July 15, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered September 13, 1918, which modified .a decree of the Greene County Surrogate's Court settling the accounts of the surviving trustees under the will of Alpheus C. Dwight, deceased.

The facts, so far as material, are stated in the opinion.

Frank H. Osborn for appellants. It was error for the Appellate Division to hold that the representatives of the deceased trustee were entitled, as matter of law, to

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statutory commissions. (*Matter of Ingraham*, 60 Misc. Rep. 46; *Matter of Rulledge*, 162 N. Y. 31; *Flynn v. Judge*, 149 App. Div. 278; *Whitehead v. Draper*, 132 App. Div. 799; *Matter of Barker*, 186 App. Div. 318; *Matter of McCormick*, 46 Misc. Rep. 386; *Matter of Allen*, 29 Hun, 9; 96 N. Y. 327; *Matter of Hayden*, 54 Hun, 197; *Whitehead v. Draper*, 132 App. Div. 799; *Matter of Willets*, 112 N. Y. 289; *Robertson v. de Brulatour*, 188 N. Y. 301; *Olcott v. Baldwin*, 190 N. Y. 99.)

Thomas H. Low and *Fred P. Harrington* for respondents. The order of the Appellate Division modifying the decree of the Surrogate's Court so as to award to the estate of Alpheus C. Dwight one-half of the full statutory commissions for receiving so much of the principal and income of the estate of Adams as were received during said Dwight's lifetime, and also one-half of the full statutory commissions on such amounts as were paid out of principal and income to the date of said Dwight's death is correct and should be affirmed. (*Matter of Kellogg*, 7 Paige, 265; *Palmer v. Dunham*, 53 Hun; 125 N. Y. 68; *Matter of Todd*, 64 App. Div. 435; *Matter of Willets*, 112 N. Y. 289; *Beard v. Beard*, 140 N. Y. 260; *Olcott v. Baldwin*, 190 N. Y. 99; *Matter of Smith's Will*, 86 Misc. Rep. 136; *Matter of Johnson*, 57 App. Div. 494; 170 N. Y. 139; *Matter of Fiske*, 45 Misc. Rep. 298; *Linsley v. Bogart*, 152 N. Y. 646.) The surrogate erred in determining that Dwight's compensation should be based upon the length of time he had been in office. (*Halsey v. Van Amringe*, 6 Paige, 12; *Collier v. Munn*, 41 N. Y. 143; *Robertson v. de Brulatour*, 111 App. Div. 882; 188 N. Y. 301; *Matter of Roberts*, 3 Johns. Ch. 43; *Olcott v. Baldwin*, 190 N. Y. 99; *Matter of Fisk*, 45 Misc. Rep. 298; *Matter of Roosevelt*, 5 Redf. 601.)

CRANE, J. On December 21st, 1910, letters testamentary upon the last will and testament of Frederick P.

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Adams of the town of Coxsackie, Greene county, New York, deceased, were issued to Eugene L. Bushe, Edward P. Dwyer and Alpheus C. Dwight. The three executors subsequently filed an account of their proceeding to December 31st, 1912, and by a decree judicially settling their accounts they paid over to themselves as trustees about \$800,000 of personal property, after having been granted \$32,297.76 for commissions and allowances. The three trustees continued to act until August 5th, 1914, when Alpheus C. Dwight died, and thereafter the remaining two trustees carried on the work of the trust. In January of 1917 Bushe and Dwyer, the surviving trustees, filed their accounts from December 31st, 1912, to December 31st, 1915, and cited Harriet M. Dwight and Thomas H. Low, as executors of the last will and testament of Alpheus C. Dwight, as parties to the proceeding.

The surrogate decided that the estate of Alpheus C. Dwight was not entitled to full commissions for receiving the amount above stated and that he had a discretionary power to fix this trustee's compensation according to the value of the services which he had performed. In his memorandum opinion he said: "The legal representatives of the estate of Alpheus C. Dwight, deceased, are entitled to an allowance for services actually performed for the benefit of the estate by the deceased executor and trustee of Alpheus C. Dwight, not by way of commissions but as payment for such services. * * * I have not computed the value of services of the deceased executor and trustee at full one-half commissions for receiving, where the amount has not been paid out, for the reason that the law does not contemplate that an executor or trustee shall be entitled to commissions for the mere act of receiving property. Such commissions are allowed for the services of legal representatives in taking care of, investing and reinvesting such property and for the responsibility connected therewith. He having served after the accounting in 1913, to the time of his death,

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approximately one-half the time that the surviving executors and trustees have served to the time of the accounting, I have computed such services to be of the value of one-half the legal commissions due the surviving executors and trustees, believing this to be the fair and just compensation for such receiving."

On appeal the Appellate Division reversed the surrogate regarding these commissions and held that as a matter of law the estate of Alpheus C. Dwight was entitled to receive one-half commissions on all the principal received and on all the principal paid out and on the income received and paid out during his lifetime. The order of the Appellate Division states that this modification is made as a matter of law and not in the exercise of the court's discretion. The trustees of the Adams estate having appealed to this court we must decide what right the estate of a testamentary trustee dying before a judicial settlement of his accounts has to compensation.

It is urged that such a trustee who does not continue until judicial accounting is entitled to no compensation; that commissions are a matter of statute and that no provision has been made by the law for such a case. Section 2753 of the Code of Civil Procedure, as amended by chapter 443 of the Laws of 1914 and by chapter 596 of the Laws of 1916, reads: "On the settlement of the account of any executor, administrator, guardian or testamentary trustee the surrogate must allow to him" the rates of commissions therein fixed. These words indicate that commissions as a matter of right can only be allowed to an accounting testamentary trustee. There is nothing in the Code provisions fixing the compensation of a testamentary trustee who dies before a judicial settlement of his accounts or whose estate, he having died, is made a party to the accounting proceedings of a substituted or surviving trustee. As it has been held that a trustee is not entitled to any commissions until allowed by the court (*Matter of Worthington*, 141 N. Y. 9;

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Beard v. Beard, 140 N. Y. 260; *Matter of Ziegler*, 168 App. Div. 735; 218 N. Y. 544) and the statute gives the surrogate power to allow commissions only on the settlement of the account of a testamentary trustee, there may be some force in this view that the estate of Alpheus C. Dwight, under these circumstances, was entitled to no commissions.

On the other hand, it is said that where a testamentary trustee dies after having received the estate and before final accounting his estate is entitled as a matter of right to one-half the statutory commissions fixed for receiving but nothing for turning over the property to his successor or survivor. This reasoning is based upon that line of authorities which hold that executors, administrators and trustees are entitled to one-half commissions for receiving funds and the other half for paying them out (*Matter of Willets*, 112 N. Y. 289), and to a practice, which is said to exist, of allowing such half commissions for receiving where the executor or trustee has died before an accounting. (*Palmer v. Dunham*, 6 N. Y. Supp. 262; affd., 125 N. Y. 68.)

Still another view is that the surrogate or Supreme Court has discretionary power and may award or withhold commissions in certain cases; and under circumstances such as here existing, may allow such sum as is reasonable for the services of a deceased trustee, not exceeding the statutory percentage.

The reasoning to sustain this view is that the testator in selecting a trustee intended to pay him, and that he is entitled to compensation, and that commissions are allowed for the care and management of the estate and not for the simple act of receiving and paying out. (*Wagstaff v. Lowerre*, 23 Barb. 209.)

All of these views have some reason to support them and perhaps some authorities, but the latter view, in our opinion, has been the general practice adopted by the courts and finds support in the decisions.

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It is fully established that a surrogate may, in his discretion, refuse commissions altogether by reason of an executor's or trustee's misconduct (*Matter of Rutledge*, 162 N. Y. 31), and yet no such power is given by statute.

In *Matter of Allen* (96 N. Y. 327) a testamentary trustee had resigned and his successor had been appointed. A dispute arose over his right to compensation. This court said:

"The testator thought proper not only to create the trust, but to require for its execution three trustees, and the law now permits compensation to persons placed in that situation, and who serve to the end of the trust without regard to the actual trouble or labor to which they have been put. (*Collier v. Munn*, 41 N. Y. 143.) It is true the petitioner cannot claim on that ground. He does not intend to continue. For reasons involving no blame, he resigns, leaving the trust still existing and to be further executed by another person. Compensation, therefore, cannot be claimed as of course, and if allowed must also be measured by a different rule from that which the law applies when the trusts created by the terms of a will, or otherwise, have been fully executed. He takes it, if at all, as one of the terms or conditions of his discharge. The court has power to award it, and within the statutory limit by which fees are allowed to executors and trustees, *its amount is discretionary.*" (330.)

In *Matter of Welling* (51 App. Div. 355, 358) it was said: "In *Matter of Rutledge* (162 N. Y. 31) the Court of Appeals held that the language of section 2730 of the Code of Civil Procedure is 'not necessarily exclusive of all discretion in the surrogate and that its exercise should be left to him upon all the facts, in the review of which by the Appellate Division ample opportunity for correction is afforded.' These executors stand in the shoes of their testator. (*Matter of Wiley*, 119 N. Y. 642; Code Civ. Proc. § 2606.) Commissions are allowed to

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trustees as compensation for services in the execution of a trust, and in the case of gross neglect and unfaithfulness the court may properly disallow them." [§ 2730 referred to is now § 2753.]

Matter of Douglas (60 App. Div. 64, 68) determined the right of an executor to compensation where he was discharged upon his own motion before the complete execution of his trust. The court said this:

"As to commissions, we are of the opinion that the surrogate was right in holding that the executor was not entitled to full commissions. Upon his own motion he was discharged before the final completion of the trust created in the will. Under such circumstances, he ought not to have full commissions, that is, commissions for receiving and disbursing the money which came into his hands. The surrogate allowed him one-half commissions, and this is all he was entitled to. In any view, the amount to be awarded, he having asked to be discharged before the final completion of the trust, was in the discretion of the surrogate."

Whitehead v. Draper (132 App. Div. 799, 801) determined that, a substituted trustee having died, his estate was entitled to reasonable compensation:

"The law does not contemplate that an estate is to be charged with full commissions by every person who shall be called in to administer a trust, nor that such persons are to perform their part of the duties without any compensation whatever; but sections 2730, 2802 and 3320 of the Code of Civil Procedure clearly contemplate that an estate shall be charged certain fees for the receiving and paying out of moneys coming into the hands of persons administering a trust. * * * Upon the death of the original trustees the execution of the trust devolved upon the Supreme Court and thereafter it became its duty to appoint some one to execute the trust and invest the appointee with all or any of the powers and duties of the original trustee * * *.

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The court appointed Jarvis and he thereupon became its agent to execute the trust so far as it then remained unexecuted. (*Wetmore v. Wetmore*, 44 App. Div. 52.) He died before the trust was fully executed and then he had received neither commissions on receiving the property nor on paying it out. The court having appointed him as its agent, he should be allowed *some* compensation for the services which it is conceded were faithfully and efficiently rendered."

No distinction should be made between the powers of the Supreme Court and those of the surrogate in dealing with the compensation of a testamentary trustee. It was held in *Matter of Runk* (200 N. Y. 447) that a Surrogate's Court has power to entertain a proceeding for the judicial settlement of the accounts of a trustee appointed by the Supreme Court as the successor of a deceased testamentary trustee, and that any trustee appointed by will or other competent authority is now authorized by express legislative enactment to render his accounts to that court.

Section 2490 of the Code of Civil Procedure says of the incidental powers of the surrogate that he may proceed in all matters subject to the cognizance of his court according to the course and practice of a court having by the common law jurisdiction of such matters.

If, therefore, the Supreme Court may, in its discretion, fix the compensation of a substituted testamentary trustee such discretion must also rest with the surrogate.

There is no apparent reason for a discretionary power existing for a substituted testamentary trustee and not for a testamentary trustee who has died before completing his work and judicial accounting. In this particular executors, administrators, testamentary trustees and substituted trustees must all be treated alike. If the law is to approximate a science it must be uniform in similar cases.

Matter of Barker (186 App. Div. 317, 325) has recently

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passed upon this very point. After giving the authorities it is stated:

"There has, however, grown up in this State the judicial rule that, when a trustee ceases the performance of his duties as such, prior to complete administration of the trust estate, he is, in the discretion of the court, entitled to reasonable compensation for the services performed."

We do not consider *Matter of Todd* (64 App. Div. 435), *Linsly v. Bogart* (67 N. Y. S. R. 653) and *Olcott v. Baldwin* (190 N. Y. 99) as authorities to the contrary of the proposition we are here stating. The question of the surrogate's authority to allow less than the statutory compensation was not up for decision. The fact that the statutory allowance in these and other cases was given is not the same as holding that the surrogate had no authority to allow a less amount in a proper case.

In this matter before us we do not say that it would have been improper for the surrogate to have allowed in his discretion all that has been given by the Appellate Division. The facts are not before us and we could not pass upon them if they were. We do hold, however, that as to the compensation to the estate of Alpheus C. Dwight, the surrogate had a discretion to be reasonably exercised in view of all the circumstances and the services rendered by the said Dwight, and that having fixed the amount within the statutory limits he did not err as a matter of law.

The order of the Appellate Division should, therefore, be reversed, and the decree of the surrogate affirmed, with costs to the appellant in this court and in the Appellate Division.

CHASE, COLLIN and CUDDEBACK, JJ., concur; HISCOCK, Ch. J., HOGAN and McLAUGHLIN, JJ., dissent.

Order reversed, etc.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. MAX MINSKY, Appellant.

Trial — witness — party may not be permitted to impeach his own witness although disreputable and unsatisfactory — claim of privilege sustained by court does not correct erroneous ruling on admissibility of evidence.

1. When the refusal of a witness to identify the defendant as the other party to a conversation testified to by the witness is not positive but equivocal and circumstances suggest that the conversation was with defendant, the question as to whom his testimony refers is one of fact for the jury.

2. A party should not be permitted to impeach his own witness. After having unsuccessfully taken a chance to secure favorable testimony, he may not attack the character of such witness and ask the jury to infer the contrary of what has been sworn to, because the falsity of the evidence is to be presumed when the character of the witness is disclosed.

3. When a disreputable witness is called and frankly presented to the jury as such, the party calling him represents him for the occasion and the purposes of the trial as worthy of belief. In the search for truth he may have to press the witness severely. But he must not thereafter, when disappointed in the testimony given, attack the credibility of the witness by asking questions tending solely to show him to be unworthy of belief, and where the only effect of an affirmative answer to a question asked by a party to his own witness for such purpose will be to discredit the witness, the question is objectionable. Error in this respect is not cured by permitting a witness to refuse to answer on the ground that the answer would disgrace him. Such ruling protects the witness but the result is as prejudicial to the rights of the party as an affirmative answer.

People v. Minsky, 173 App. Div. 938, reversed.

(Argued June 5, 1919; decided July 15, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 28, 1916, which affirmed a judgment of the Court of General Sessions of the Peace in the county of New York rendered upon a verdict convicting the defendant of the crime of murder in the second degree.

The facts, so far as material, are stated in the opinion.

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Karl W. Kirchwey for appellant. Permitting the district attorney to impeach and cross-examine his own witness, Florence Horowitz, was reversible error. (*Brayman v. Grant*, 130 App. Div. 272; *People v. Dixon*, 118 App. Div. 593; *Lawrence v. Barker*, 5 Wend. 301; *Thompson v. Blanchard*, 4 N. Y. 303; *Bullard v. Pearsall*, 53 N. Y. 230; *Coulter v. A. M. U. Express Co.*, 56 N. Y. 585; *Sanchez v. People*, 22 N. Y. 147; *Morris v. Wells*, 7 N. Y. Supp. 61; *Tice v. Dromgoole*, 33 Hun, 365; *Sisson v. Conger*, 1 T. & C. 564; *Conklan v. M. S. Ry. Co.*, 40 Misc. Rep. 619.) The trial court erred in permitting evidence of transactions between the witness Florence Horowitz and a person other than the defendant to go to the jury. (*Kirby v. D. & H. C. Co.*, 20 App. Div. 473; *Barr v. Sofranski*, 130 App. Div. 783; *Voorhees v. Unger*, 151 App. Div. 35; *Hankinson v. Vantine*, 152 N. Y. 20; *Agate v. Richards*, 5 Bosw. 456; *Fink v. Manhattan R. R. Co.*, 15 Daly, 479; *Jackson v. King*, 5 Cow. 237; *Jackson v. Cody*, 9 Cow. 140; *Hatcher v. Rocheleau*, 18 N. Y. 86; *People v. Snyder*, 41 N. Y. 397; *People v. Smith*, 45 N. Y. 772; *Hoffman v. Met. Life Ins. Co.*, 135 App. Div. 739; 141 App. Div. 713; *Douler v. Prudential Ins. Co.*, 143 App. Div. 537; *Bloomingdale v. Keller*, 68 Misc. Rep. 337; *Matter of Kennedy*, 82 Misc. Rep. 214.)

Edward Swann, *District Attorney* (*Robert C. Taylor* of counsel), for respondent. The claim that the witness "Flo" was improperly impeached by the district attorney cannot be sustained. (*People v. Sherman*, 133 N. Y. 349; *People v. Sexton*, 187 N. Y. 495; *Bullard v. Pearsall*, 53 N. Y. 231; *People v. Kelly*, 113 N. Y. 647; *Vollkommer v. Cody*, 177 N. Y. 124; *Wigm. on Ev.* 1030, § 1904; *People v. De Martini*, 213 N. Y. 203; *People v. Taylor*, 3 N. Y. Cr. Rep. 297; 101 N. Y. 608; *People v. Laudiero*, 192 N. Y. 304.) "Flo's" testimony as to "Shuey's" conduct was properly admitted. (*Dolan Case*, 186 N. Y. 4; *Dunbar Const. Co. Case*, 215 N. Y. 416; *Bruno Case*, 220 N. Y. 702.)

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POUND, J. Defendant, Max Minsky, also known as Max Harris and by the nickname Shuey, was indicted for murder in the first degree with Moe Horowitz, Louis Penitsky and Terry Davis for the killing of Max Levine. Defendant was tried separately and convicted of murder in the second degree. The judgment of conviction was unanimously affirmed by the Appellate Division and the only question before us is whether the trial court made erroneous rulings on the admissibility of evidence which were properly excepted to by the defendant.

In opening on behalf of the People, the assistant district attorney candidly said: "that outside of the doctor and the police officers and those of the district attorney's staff who are going to testify here, I do not believe there is a reputable witness in the case."

Levine was killed on the 12th day of April, 1913, in a small three-room flat occupied by the co-defendant Moe Horowitz and his wife Flo in the rear of a building at No. 207 East Fourteenth street. He was a young man, recently from Elmira Reformatory. The height of his offending seems to have been that he was ambitious to be tough and a leader of toughs and that he had turned his back on the friends who had been good to him when he came out of jail. He came to the flat on the night of the murder. The co-defendant Penitsky was there. A man named Perlmutter who was at the flat, hiding from arrest for a shooting up in Harlem, came in next. Then came this defendant with Horowitz and the co-defendant Davis. Perlmutter was the People's witness. He said that Levine took out a pistol and asked for some lead; Terry, Moe and defendant drew pistols and said they had plenty of lead and put up their pistols again; Levine attempted to fix his pistol. The meaning of this dramatic flourish is conjectural but the judicious Perlmutter says he then decided to leave the place. As he was leaving, three pistol shots were fired. Levine was killed as he was fixing his pistol and they all ran out. Perlmutter's

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story is obviously incomplete. He says he saw the three, surrounding Levine, and saw Terry Davis put a bullet into Levine, but he gives no adequate explanation for the assault of the three men upon the dead man. One Wechsler was also there, but Perlmutter did not disclose that fact at first.

The defendant made a statement before the trial in which he denied all connection with the crime, but he admitted that he came to the place after the shooting and talked with Flo Horowitz and a girl called Nookie who had a dog. He said that the killing of Levine was not mentioned in the interview.

Then came Flo Horowitz as a witness for the People, and she testified that she saw a man known to her only by the name of Shuey, who was *not* the defendant, and the girl Nookie, on the sidewalk at the flat after the killing and that the Shuey she saw said and did various things from which a guilty knowledge of the crime might be inferred and which tended to corroborate Perlmutter's narrative. The witness was neither consistent nor wholly convincing in her denial that the Shuey she saw on this occasion was the defendant. During the course of her examination she said that she knew only one Shuey; that the Shuey she talked with was known as Max Harris and that she knew the defendant as Max Harris. She said she had never seen defendant before she saw him in the Tombs after his arrest and she also said that she knew him, but not to speak to, before she saw him in the Tombs.

The trial court received her evidence over defendant's objection and exception; submitted to the jury the question whether Perlmutter was an accomplice; and finally directed the jury to acquit if they believed that the Shuey referred to by her was not the defendant.

The evidence was competent in view of the statement of the defendant that he had talked with Flo Horowitz

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after the killing and the witness's own equivocal denial of the identity of the defendant and the man of the same name that she saw. Shuey is a common nickname among these people, but the case for identity is much stronger than mere identity of name, on the one hand, against positive denial of identity on the other. The circumstances were for the jury to pass upon and it was for it to say whether the two Shueys were or were not identical.

The witness was, however, a necessary and material witness for the People and the defendant complains that the assistant district attorney was allowed to impeach her. The witness proved adverse, if not disappointing. The court, in the exercise of its discretion, properly allowed the district attorney to cross-examine her (*People v. Sexton*, 187 N. Y. 495, 509), although it does not appear that he was surprised by her failure on the witness stand positively to identify her friend Shuey as the defendant. The testimony was adverse but perhaps not unexpectedly adverse. The district attorney put her on the stand as a hostile witness to get what he could from her. By so doing he did not necessarily present her as a witness of good moral character. The law does not limit a party to witnesses of good character, nor does it compel a party to conceal the bad record of his witnesses from the jury, to have it afterwards revealed by the opposing party with telling effect. Such a rule would be unfair alike to the party calling the witness and the jury. Men have been convicted of murder in the first degree by the evidence of admittedly dangerous and degenerate witnesses, law breakers and professional criminals. (*People v. Becker*, 215 N. Y. 126; 210 N. Y. 274.) But when a disreputable witness is called and frankly presented to the jury as such, the party calling him represents him for the occasion and the purposes of the trial as worthy of belief. In the search for truth he may have to press the witness severely. Even the best of men may be an

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unwilling witness. But he must not thereafter attack the credibility of the witness by general character evidence tending solely to show him to be untruthful and unworthy of belief. Where the only effect of an affirmative answer to a question asked by a party to his own witness for such purpose will be to discredit the witness, the question is objectionable. (*Bullard v. Pearsall*, 53 N. Y. 230; *Pollock v. Pollock*, 71 N. Y. 137, 152.) In this case, the assistant district attorney presented this woman not as a reputable witness, generally speaking, but as one whose evidence might be believed. When he was disappointed, he not only cross-examined her sharply but also asked her if she was not at the time of the killing a prostitute; soliciting men on the street; having several venereal diseases. To those questions timely objection was made and overruled and exception taken. The court did not compel the witness to answer, and the witness did not answer because she said the answers would disgrace her.

The court erroneously permitted the assistant district attorney to ask these questions, not by way of introducing a willing witness with an unfortunate past, but for the purpose of discrediting his own witness. The error was not cured by permitting her to refuse to answer. The questions were objectionable and the objection should have been sustained. That was the right of the defendant. The privilege of the witness is solely for the protection of the witness. It may be claimed or waived as the witness sees fit and the party cannot complain. (*Gt. W. Turnpike Co. v. Loomis*, 32 N. Y. 127, 138.) To the defendant, the claim of privilege was as prejudicial as an affirmative answer would have been.

The district attorney put the witness on the stand with the power to destroy her standing for veracity if she spoke against him and to present her testimony as trustworthy if she spoke for him. A party should not be permitted, after having unsuccessfully taken a chance to secure favorable testimony, to attack his own

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witness and ask the jury to infer the contrary of what has been sworn to, because the falsity of the evidence is to be presumed from the general character of the witness. A witness of bad character has enough to fear from the adverse party without being intimidated by the party calling him. The power to coerce a witness may as reasonably be expected to beget a lie as to force the truth from unwilling lips.

The jury may have been led to infer that because the People's witness was a bad woman, she saw defendant after Levine was killed, although she denied it. The error, therefore, went to the heart of the People's case. The People were not bound by her denial. They could, without impeaching the witness, ask the jury to infer that she did not tell the whole truth and nothing but the truth. They might have resorted to other proof if other proof was available.

The district attorney may not now say that he merely sought to show the character of the witness as a part of her history. (*People v. Taylor*, 36 Hun, 639; 101 N. Y. 608; opinion 3 N. Y. Crim. Rep. 297, 299.) He said in effect, and properly, when he called the woman: "this witness is not reputable, but she will now speak truly;" but in the end he shifted the emphasis and said in effect "she is depraved and unworthy of belief, and I now ask you not to believe her but to believe the contrary of her positive assertion." The purpose of the evidence and the order of the proof, rather than the evidence itself, condemned it.

The judgment should be reversed and a new trial granted.

HISCOCK, Ch. J., COLLIN and ANDREWS, JJ., concur; CUDDEBACK and CARDOZO, JJ., vote to affirm under section 542 of the Code of Criminal Procedure; McLAUGHLIN, J., not sitting.

Judgment reversed, etc.

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CHARLES C. BULL, as Trustee under the Will of WILLIAM V. BRADY, et al., Appellants, *v.* FRANK V. BURTON et al., Respondents.

Real property — specific performance — when covenants constitute incumbrances making the title unmarketable.

1. The court should not compel the specific performance of a contract to purchase real property when the purchaser would be subject to an action at law for damages if restrictive covenants constituting incumbrances on the title should be violated.

2. A covenant in a deed by which the purchaser and his representatives, heirs and assigns, are prohibited from using specified materials in erecting a building or buildings on the real property conveyed, and also prohibiting the use of the property for specified purposes, does not make the title to such property unmarketable if the purchaser, his representatives, heirs and assigns, cannot use such materials in the erection of a building thereon or the property for the purposes mentioned because of some general statute or other law which is equally prohibitive, where the possibility of a change in the statutes or ordinances so as to permit the use of such building materials as are fairly comprehended within such enumeration is upon the facts disclosed too remote for practical consideration.

3. Where it appears, upon an examination of the covenants relating to party walls in an agreement between the owners of adjoining lots in a city, that the covenants are confined to the wall in construction at the time the covenant was made — there being no express covenant relating to rebuilding or repairing such wall and the right to extend the wall being confined to an extension of the wall then in course of construction — such covenant does not create an incumbrance, especially where, as appears from the record herein, the parties have entirely and effectually abandoned the right of extending the party wall being erected at the time the agreement was executed, each party having built an independent wall upon his own lot.

4. Where there were three adjoining lots, the northerly lot being owned by one person and the southerly lot owned by another and the middle one owned by them as tenants in common, and the owners thereof entered into an agreement in writing, for themselves, their respective heirs and assigns, that they would not erect or use or permit to be erected or used upon any of the three lots any stable either

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public or private, such agreement creates a restrictive covenant which interferes with a right existing in the owners of the lots and constitutes an incumbrance.

Bull v. Burton, 177 App. Div. 824, affirmed.

(Argued April 16, 1919; decided July 15, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 18, 1917, affirming a judgment in favor of defendant entered upon the report of a referee.

This action was brought to compel the specific performance of a contract to convey real property. The contract provides for the delivery to the respondents of a deed in proper statutory short form conveying "the fee simple of the said premises, free of all incumbrances." The action is defended because the respondents allege that the appellants failed to perform their contract, and that there are certain incumbrances on said real property as will more fully appear in the opinion.

The issues joined herein were tried before a referee who made a report in favor of the respondents. On his report a judgment was entered from which an appeal was taken to the Appellate Division of the Supreme Court where the judgment so entered was unanimously affirmed. (*Bull v. Burton*, 177 App. Div. 824.) It is from that judgment of the Appellate Division that the appeal is taken to this court. Other facts appear in the opinion.

Spotswood D. Bowers for appellants. The covenant against carrying on certain trades upon the *locus in quo* does not render the title unmarketable. (*Korn v. Campbell*, 192 N. Y. 490; *E. L. Assur. Society v. Brennan*, 148 N. Y. 661; *Gebhard v. Addison*, 87 App. Div. 375; *Patterson v. Johnson*, 168 N. Y. Supp. 163; *Dime Savings Bank v. Butler*, 96 Misc. Rep. 87; *Scott v. McMillan*, 76 N. Y. 141; *Schwartz v. Cahill*, 220 N. Y. 174; *Smith*

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v. *Cornell*, 111 N. Y. 558; *Eq. L. Assur. Society v. Bostwick*, 100 N. Y. 629; *Halstead v. Atterbury*, 105 App. Div. 532.) The party wall agreement did not render the title unmarketable. (*Wilmurt v. McGrane*, 16 App. Div. 412; *Ennis v. Brown*, 1 App. Div. 22; *Harsha v. Reed*, 45 N. Y. 415; *Cole v. Hughes*, 54 N. Y. 444; *Scott v. McMillan*, 76 N. Y. 141; *Hempstead v. Lawrence*, 122 N. Y. Supp. 1040; *Morse v. Press Publishing Co.*, 71 App. Div. 351; *State v. Stepp*, 63 W. Va. 254; *Northwestern Traveling Men's Assn. v. Crawford*, 126 Ill. App. 468; *Negus v. Becker*, 143 N. Y. 303.) The covenants complained of do not render the property unmarketable because they in no way diminish the value of the property. (*Forster v. Scott*, 136 N. Y. 577; *Huyck v. Andrews*, 113 N. Y. 81; *Clement v. Burtis*, 121 N. Y. 708; *Riggs v. Purcell*, 66 N. Y. 193; *Gebhard v. Addison*, 87 App. Div. 380; *Ray v. Adams*, 44 App. Div. 173; *Wetmore v. Bruce*, 118 N. Y. 319.)

Edward E. Sprague for respondents. The restrictive covenants render the title unmarketable. (*Dieterlin v. Miller*, 114 App. Div. 40; *Heim v. Schworer*, 155 App. Div. 295; 187 N. Y. 543; *Ray v. Adams*, 44 App. Div. 173; *Goodrich v. Platt*, 144 App. Div. 771; *Van Schaick v. Lese*, 31 Misc. Rep. 610; *Kountze v. Helmut*, 67 Hun, 343; *Raynor v. Lyon*, 46 Hun, 227; *Reynolds v. Cleary*, 61 Hun, 590.) There is no force in the appellant's contention that the covenants are not an incumbrance because Wendel was not shown to have owned any other land at the time he imposed them. (*Daley v. Brown*, 167 N. Y. 381; *Oliphant v. Burns*, 146 N. Y. 218; *Post v. Man. Ry. Co.*, 125 N. Y. 697; *Grunblatt v. Hermann*, 144 N. Y. 13; *T. G. & T. Co. v. Fallon*, 101 App. Div. 189.) The party wall agreement renders the title unmarketable. (*Hayden v. Pinchot*, 172 App. Div. 102; *Sebald v. Mulholland*, 155 N. Y. 455; *Crawford v. Krollpfeiffer*, 195 N. Y. 185.)

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CHASE, J. On December 27, 1911, the appellants entered into a contract with the respondents to sell to them certain real property in the city of New York known as No. 448 Fifth avenue. It now appears that one of the appellants' predecessors in title on July 8, 1859, conveyed a lot on Fifth avenue, including the real property in question, to another of appellants' predecessors in title, and included in the deed there is a covenant as follows:

"And the said party of the second part (the grantee) for himself, his heirs and assigns, doth hereby covenant to and with the said John D. Wendel (the grantor), his heirs, executors and administrators, that neither the said party of the second part nor his heirs or assigns shall or will at any time hereafter erect any buildings within forty feet of the front of said lots except of brick or stone with roofs of slate or metal and will not erect or permit upon any part of the said lots any slaughter house, smith shop, forge, furnace, steam engine, brass foundry, nail or other iron factory, or any manufactory of gun powder, glue, varnish, vitriol, ink or turpentine, or for the tanning, dressing or preparing skins, hides or leather, or any brewery, distillery, or any other noxious or dangerous trade or business."

The lot so conveyed in 1859 was prior to February 22, 1864, divided into three lots of which the lot now in question is one. On that day one Babcock owned the northerly one of said three lots and one Brady the southerly one of said three lots, being the lot in question, and Babcock and Brady owned the middle one of said lots as tenants in common. On February 27, 1864, said Brady and Babcock entered into an agreement in writing, which, among other things, contains the following provisions:

"Second. It is further covenanted, declared and agreed that all the lots of ground hereinbefore described (the three lots into which the lot conveyed in 1859 was

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divided) are already subject to the covenant against nuisances and regulating the character of improvements to be made thereon, contained in a deed of conveyance from John D. Wendel and wife to Henry A. Hurlbut (the deed of 1859 hereinbefore mentioned), recorded in the office of the Register of the city of New York and county of New York, in Liber 791 of Conveyances, at page 301.

"And it is further covenanted, declared and agreed, that neither of the parties to these presents, or his or their heirs or assigns, shall or will at any time hereafter erect or use, or permit to be erected or used upon any of the said lots of ground hereinbefore described, any stable either public or private.

"*Third.* And whereas, the parties to these presents are now erecting a wall which will stand half its width on the northerly margin of the lot thirdly above described, and the other half of the southerly margin of the lot secondly above described, and also another wall which will stand half of its width on the northerly margin of the lot secondly above described, and the other half upon the southerly margin of the lot first above described, which walls are intended to be about seventy-two feet in depth from the front to rear, and to be erected in all respects according to the plans already prepared by Griffith Thomas, architect. Now it is further mutually declared and agreed that each of said walls shall be and remain a party wall for the joint and equal use of the owners from time to time of the respective lots on which such wall shall stand; also that the owner from time to time of either portion of either of said walls desiring to add to his building may for that purpose and at his own expense, extend such wall higher or to a greater depth from the street, making such extension in substantial manner and at least sixteen inches in thickness, provided that if the owner of the other or adjoining house shall at any time thereafter use such extended wall, he shall then

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pay for one-half of so much as he shall so use, and the amount to be paid by him shall be the price or value at that time of one-half of the materials contained in the portion of the wall so used, and of the labor of laying them there, and such extended wall may be further extended by either party in like manner and with like mutual rights in respect to the same; and it is also further understood and agreed that whenever the half wall that stands on the southerly margin of the lot first hereinabove described shall be used or sold, the cost or value thereof shall belong and be paid to the parties aforesaid equally.

"*Lastly*, it is further covenanted, declared and agreed that all the covenants herein contained or referred to shall be construed to run with the said land and every part of it, and to bind, and also enure to the benefit of the heirs and assigns of said respective parties."

The question involved on this appeal is whether on the record before us the restrictions, agreements, regulations and covenants hereinbefore mentioned or any of them constitute an incumbrance of the real property described in the contract which justify the refusal of the respondents to carry out their contract to purchase the same.

A covenant in a deed by which the grantor, his representative, heirs and assigns, are prohibited from using specified materials in erected a building or buildings on the real property conveyed, and also prohibiting the use of the property for specified purposes does not make the title to such property unmarketable if the grantor, his representative, heirs and assigns, cannot use such materials in the erection of a building thereon or the property for the purposes mentioned because of some general statute or other law which is equally prohibitive. The covenant in the deed of 1859, so far as it relates to the materials that shall be used in the erection of a building within forty feet of the front of said lot, does not make the title to the lands in question unmarketable because the prohibition does not exceed reasonable

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prohibitions by statute or ordinance. The possibility of a change in the statutes or ordinances so as to permit the use of building materials other than brick, stone, slate or metal and other materials fairly comprehended within such enumeration is upon the facts disclosed too remote for practical consideration.

An examination of the covenants in the agreement of 1864, so far as they relate to party walls, shows that they are confined to *the wall* in course of construction at the time the covenant was made. (*Devyr v. Schaefer*, 55 N. Y. 446.) There is no express covenant in it relating to rebuilding or repairing such wall. The right to extend the wall is confined to an extension of *the wall* then in course of construction.

It is held in this state that a covenant relating to an existing party wall is not an incumbrance upon the property. (*Hendricks v. Stark*, 37 N. Y. 106, 111.) The court in that case say: "It is true that the erection of a party wall creates a community of interest between the neighboring proprietors, but there is no just sense in which the reciprocal easement for its preservation can be deemed a legal incumbrance upon the property. The benefit thus secured to each is not converted into a burden by the mere fact that it is mutual and not exclusive."

When the state of things which results in a contract for a particular party wall ceases and the right to continue an obligation for a party wall as between the owners of the adjoining property is not provided for by contract the easements terminate. (*Partridge v. Gilbert*, 15 N. Y. 601; *Hearit v. Kruger*, 121 N. Y. 386.)

It is not contended by the respondents in this case that the *existing party wall* is an incumbrance to the real property in controversy. They say in their brief, referring to the trial of the action and the findings made by the referee, "No objection was made to the existence of the party wall nor have we at any time urged that

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the agreement so far as it relates to the existing wall is objectionable."

They insist that the covenants for an extension and for a contribution to the expense of an extension run with the land and that because such covenants run with the land they are an incumbrance.

It appears from the record that the grantors of the respective parties to the agreement have each voluntarily erected a wall from about the end of the wall referred to in the agreement to the end of the lots respectively. Said walls are erected on either side of the boundary line and each is independent of the other, and they severally constitute the side wall of a building erected on the rear of the lots respectively. So far as appears from the record, therefore, the parties hereto have wholly, entirely and effectually abandoned the right of extending further into the lots the party wall which was being erected at the time when the agreement of 1864 was executed. Each party has built upon his lot, using such independent wall owned by him in severalty. (*Duncan v. Rodeeker*, 90 Wis. 1.) The wall and building on the property adjoining the lands in question were so erected prior to the agreement on which this action was brought, but the wall and building on the lot in question were built subsequent to the commencement of this action and before the trial thereof.

The right by covenant to extend the party wall higher than contemplated when the same was being erected and at the time the covenant was made did not add to the right that existed in connection with the maintenance of the party wall itself.

The parties interested in a wall so maintained unless restricted in its use can extend the same higher so long as the rights of the other in the party wall are not affected or endangered. (*Brooks v. Curtis*, 50 N. Y. 639.)

We do not for the reasons stated in the cases in this court hereinafter mentioned think that the covenant to

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pay for one-half of the expense of increasing the height of the party wall as provided by the covenant, as an adjoining owner might use thereof, creates an incumbrance in this case. Whether such a contract is an incumbrance has been many times considered by this court and it is not necessary to restate the principles upon which the decisions have been placed. The respondents rely upon the decision of this court in *Mott v. Oppenheimer* (135 N. Y. 312). The decisions of this court sustaining the position of the appellants are *Cole v. Hughes* (54 N. Y. 444); *Scott v. McMillan* (76 N. Y. 141); *Hart v. Lyon* (90 N. Y. 663); *Brooks v. Curtis* (50 N. Y. 639); *Negus v. Becker* (143 N. Y. 303); *Sebald v. Mulholland* (155 N. Y. 455); *Crawford v. Krollpfeiffer* (195 N. Y. 185). In the last two cases mentioned the distinction between the *Mott v. Oppenheimer* case, in which the covenant was held to run with the land and constitute an incumbrance, and the cases similar in principle to the one now before us, was pointed out.

Restrictive covenants generally are broadly divided into three classes as stated by this court in *Korn v. Campbell* (192 N. Y. 490). The covenants in the deed of 1859 come within the second class mentioned by the court in that case. Its recognition in the agreement of 1864 of the covenants in the deed of 1859 did not enlarge the scope of the covenants. (*Korn v. Campbell, supra.*) If Wendel, the grantor, was not the owner of other contiguous or neighboring lands which he retained and for the benefit and protection of which the restrictive covenants were inserted, there is no one so far as appears from the record to enforce compliance with such covenants. It is asserted that Wendel at the time of the execution and delivery of the deed of 1859 was the owner of other contiguous real property for the benefit of which the covenants were made. At the trial it seems to have been assumed without formal proof that Wendel owned other lands contiguous to lands in controversy at the time of the

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delivery of the deed. The respondents offer to show such title in this court. Evidence in this court to sustain the judgment can only be supplied on appeal when the matter is of record and cannot be answered or changed. (*People v. Flack*, 216 N. Y. 123, 129.) Evidence of the title of Wendel to other lands cannot be shown in this court because it could result in a controversy and not the mere supplying of an omission. We think, however, that it was assumed in this case, not only during the trial but at all times prior to the appeal to this court that Wendel was the owner of contiguous property for the benefit of which the restrictive covenants were inserted in the deed.

There is a restrictive covenant in the agreement between Babcock and Brady in 1864 relating to the erection of a stable, either public or private, which clearly inured to the benefit of the lot. Even if we assume, therefore, that Wendel owned no other lands contiguous to those in question, the judgment would have to be sustained because of the covenant in regard to a stable. All of the facts relating to this covenant are included in the findings and the conclusion to be reached therefrom is before this court for consideration.

The owner of real property is entitled as of right to the free use of the same. If he is unable to maintain a stable thereon, or maintain or permit to be maintained certain specified businesses, or any noxious or dangerous trade or business, he does not have complete dominion over his real property. His use thereof in that case is a restricted use. If an owner should in the language of the learned referee before whom this case was tried be "foolish enough to seek to violate" the covenants and attempt to use his lands for a stable, or for one of the businesses prohibited, he would subject himself to litigation and damages. An owner's use of his property in that case is restricted and circumscribed and his dominion thereof is not complete. The covenant in the deed of 1859 runs with the

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land, and if it affects the land either in itself or in its value or in the way in which it can be enjoyed, it is an incumbrance.

The restrictive covenants in this case are more than covenants not to erect upon the premises any building or carry on any business "which shall or may cause or become a nuisance to others owning lands contiguous thereto." Such a covenant does not create a defect in the title. It binds the owner no further than he would be bound by law in the absence of a covenant. (*Clement v. Burris*, 121 N. Y. 708.) A restrictive covenant in a deed should be construed strictly (*Duryea v. Mayor, etc., of N. Y.*, 62 N. Y. 592; *Kitchen v. Brown*, 180 N. Y. 414), but according to the intent of the parties to the deed. (*Munro v. Syracuse, L. S. & N. R. R. Co.*, 200 N. Y. 224.) The covenant under consideration if enforced will interfere with a right existing in the owner of the land. Any right existing in another to use the land, or whereby the use by the owner is restricted, is an incumbrance within the legal meaning of the term. (*Wetmore v. Bruce*, 118 N. Y. 319; *Forster v. Scott*, 136 N. Y. 577.) It affects and interferes with legitimate business, and business termed noxious and dangerous, although not *per se* a nuisance, and such interference constitutes an incumbrance. (*Dieterlen v. Miller*, 114 App. Div. 40; *Heim v. Schwoerer*, 115 App. Div. 295 [decision based on authority of *Dieterlin v. Miller*, *supra*]; *affd.*, 187 N. Y. 543.)

Courts have recognized a distinction between an action to compel specific performance of a *contract* between parties for the purchase and sale of real property and a *bidding* at a judicial sale. Where property is offered for sale under a judgment or order of the court and a person becomes a purchaser at such sale, the courts in certain cases have directed the completion of the purchase although defects are alleged in the title of the property that are of remote possibility and in any event not

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affecting the market value of the property sold. (*Riggs v. Pursell*, 66 N. Y. 193; *Wetmore v. Bruce*, *supra*.)

An order enjoining parties affected by a restrictive covenant has in special cases been withheld where it would be inequitable to so use the processes of the court, and that even in cases where an action for damages would be sustained. (*Trustees of Columbia College v. Thacher*, 87 N. Y. 311.)

If, however, a person enters into a contract for the purchase of real property he cannot be required to complete the purchase if its use is substantially restricted although such restriction in the ordinary market would not affect the price to be paid therefor. The following cases, viz., *McClure v. Leaycraft* (183 N. Y. 36); *Bachelor v. Hinkle* (210 N. Y. 243); *Jackson v. Stevenson* (156 Mass. 496); *Roth v. Jung* (79 App. Div. 1); *Deeves v. Constable* (87 App. Div. 352); *Schwarz v. Duhne* (118 App. Div. 105); *Schefer v. Ball* (120 App. Div. 880; affd., 192 N. Y. 589) and others which it is claimed hold in effect that the restrictive covenants in a deed should be generally ignored if the *locus in quo* has changed from a residential to a business district, do not so hold.

They do hold that a court of equity should not do inequity, and that if the granting of an injunction to enforce restrictive covenants will result in inequity it will be denied, and leave the plaintiff to his remedy at law. That is the rule fully established by *Trustees of Columbia College v. Thacher* (*supra*). The court speaking by Judge DANFORTH, referring to a court of equity, say, "It gives or withholds such decree according to its discretion in view of the circumstances of the case and the plaintiffs' prayer for relief is not answered, where, under those circumstances, the relief he seeks would be inequitable." (p. 317.)

The court further say: "In the case before us the plaintiffs rely upon no circumstance of equity but put their claim to relief upon the covenant and the violation

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of its conditions by the defendant. *They have established, by their complaint and proof, a clear legal cause of action. If damages have been sustained, they must, in any proper action, be allowed.* But on the other hand the defendant has exhibited such change in the condition of the adjacent property and its character for use as leaves no ground for equitable interference, if the discretion of the court is to be governed by the principles I have stated, or the cases which those principles have controlled.” (p. 319.)

The *McClure* case was an action to restrain the defendant from erecting an apartment house in alleged violation of a restrictive covenant. The Special Term dismissed the complaint. The judgment of the Special Term was reversed in the Appellate Division. This court modified the judgment of the Special Term so as “to declare that it is without prejudice to an action at law,” and as thus modified affirmed it.

The *Batchelor* case was brought to enforce a restrictive covenant. After the making of the covenant the buildings in the neighborhood were entirely changed in character and the court held that the covenant should not be enforced in equity but that the plaintiff should be remitted to an action at law for her damages.

The *Jackson* case was a bill in equity brought to enforce the restrictions in a deed but on account of changed circumstances the court refused to grant the injunction but the bill was retained for the purpose of assessing the plaintiff's damages as in an action at law.

In the *Deeves* case it is held that the easement therein mentioned had been extinguished.

The *Roth*, *Schwarz* and *Schefer* cases were each to obtain injunctive relief against restrictive covenants and the rule stated in the *Columbia College* case was restated and enforced.

The court should not compel the specific performance of a contract to purchase real property when the purchaser

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would be subject to an action at law for damages if restrictive covenants constituting incumbrances on the title should be violated.

The judgment of the Appellate Division should be affirmed, with costs.

McLAUGHLIN, J. (dissenting). On December 27, 1911, the parties entered into a contract by which the plaintiffs agreed to sell, and defendants to purchase, a lot on the westerly side of Fifth avenue in the city of New York, between Thirty-ninth and Fortieth streets, known as No. 448. The lot has a frontage of 33 feet on the avenue and is 110 feet deep. The contract price was \$650,000, of which \$25,000 was paid at the time the contract was signed. On the day fixed for passing title, defendants refused to complete the purchase, on the ground that the title tendered was unmarketable, in that it was encumbered by certain restrictive covenants not mentioned in the contract. This action was then brought to compel them to specifically perform. The issues raised by the pleadings were sent to a referee to hear and determine. He made a report in favor of defendants, upon which judgment was entered, which was unanimously affirmed by the Appellate Division. Plaintiffs appeal to this court.

The referee found, as a fact, that plaintiffs' title was derived from one John D. Wendel, through a deed of conveyance bearing date the 13th of September, 1859; that this conveyance contained the following covenant on the part of the grantee: "And the said party of the second part, for himself, his heirs and assigns, doth hereby covenant to and with the said John D. Wendel, his heirs, executors and administrators, that neither the said party of the second part nor his heirs or assigns shall or will, at any time hereafter, erect any buildings within forty feet of the front of said lots, except of brick or stone, with roofs of slate or metal, and will not erect or permit upon any part of said lots any slaughter house, smith

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shop, forge furnace, steam engine, brass foundry, nail or other iron foundry, or any manufactory of gun powder, glue, varnish, vitriol, ink or turpentine, or for the tanning, dressing or preparing skins, hides or leather, or any brewery, distillery or any other noxious or dangerous trade or business;" that on the 27th of February, 1864, title to the lands vested in one Brady, who was also at that time the owner of an undivided half of the lot of land next adjoining on the north fronting 32 feet 9 inches on Fifth avenue; that on that day Brady entered into an agreement with one Babcock, who at that time was the owner of the remaining undivided half of the last-mentioned lot and was also the owner of the next adjoining lot fronting 33 feet on Fifth avenue; that this agreement contained the following provision: "It is further covenanted, declared and agreed that all the lots of ground hereinbefore described are already subject to the covenant against nuisances and regulating the character of improvements to be made thereon contained in a deed of conveyance from John D. Wendel and wife to Henry A. Hurlbut * * *. And it is further covenanted, declared and agreed that neither of the parties to these presents or his or their heirs or assigns shall or will, at any time hereafter, erect or use, or permit to be erected or used upon any of the said lots of ground hereinbefore described, any stable either public or private." Then followed provisions as to a party wall, its construction and use, which it seems to me unnecessary here to consider.

The referee also found as a fact that at the time of the conveyance from Wendel to Hurlbut, in 1859, and the agreement between Brady and Babcock, in 1864, Fifth avenue in the city of New York, from Twenty-third to Forty-fourth streets, was used and occupied as a residential district and the most valuable use to which the land on said avenue could be devoted during said period was for residences; that beginning with the year

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1903 the character and use of the buildings on Fifth avenue between the streets named commenced to change, the residential buildings being altered for business use, or being torn down and new buildings erected, suitable for business, in place thereof; that such changes continued until the year 1911, at which time, and at the time of the trial of the action, the character of the improvements on the entire avenue between said streets had undergone a complete change and the only profitable use that could be made of the land fronting on the avenue was for business purposes; that the value of the land had greatly increased since the conveyance by Wendel and the agreement between Brady and Babcock, which increase was due to the change in the character of the buildings and the use to which the same were put; that the existence of the party wall was not a burden upon the land, no matter what might be the character of the improvements erected, but on the contrary could be used advantageously as part of the side wall of any structure that might be erected thereon; that it did not diminish the market value of the land; and so much of the covenant contained in the deed from Wendel as provided against the erection of a slaughter house, smith shop, furnace, etc., did not diminish the respective market value of the land in question because it was far too valuable from an economic point of view to be devoted to any such use and because of such value no person would be likely to devote the premises to any of the uses forbidden. Nor did the agreement between Brady and Babcock as to the erection of a stable diminish, in any respect, the market value for a similar reason.

As conclusions of law he found that none of the covenants in the deed from Wendel to Hurlbut, or the agreement between Brady and Babcock, were incumbrances upon the land or constituted a valid objection to the title tendered, except the one in the deed from Wendel

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to Hurlbut by which the grantee agreed not to erect or permit upon the lots any slaughter house, smith shop, forge, furnace, etc., and as to that he found such covenant did constitute an incumbrance and was a valid objection to the title.

In view of the unanimous affirmance by the Appellate Division of these findings and conclusions of law, the question is squarely presented whether the covenant in the deed from Wendel to Hurlbut in 1859, not to erect or permit to be erected on the lot in question any slaughter house, etc., constituted a valid objection to the title and justified the defendants in rejecting it.

I am of the opinion it did not. There is not a particle of proof in the record, as I read it, nor was it assumed at the trial, that Wendel, at the time he made the conveyance in 1859, was the owner of other contiguous or neighboring lands which he retained and for the benefit and protection of which the covenant and restriction were inserted. If he were not, then there is no one, so far as appears from the record, to enforce compliance with such covenant. It was, at most, a personal covenant and its recognition in the agreement of 1864 did not enlarge its scope. (*Korn v. Campbell*, 192 N. Y. 490.) Specific performance should have been decreed upon this ground. Respondents, recognizing the force of this contention upon the argument before this court, sought to supply this proof, which we held could not be done. Evidence to sustain a judgment on appeal to this court can only be supplied when the matter is of record and cannot be answered or changed. (*People v. Flack*, 216 N. Y. 123.) To permit evidence to be supplied as suggested by respondents would introduce an issue which this court could not determine.

But even assuming that Wendel did have other lands for the benefit of which this restrictive covenant was inserted in his deed of conveyance, I am still of the opinion that specific performance should have been

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decreed. When this deed of conveyance was made, the *locus in quo* was devoted to residential purposes. It has ceased to be such and at the time the parties to this action entered into their agreement substantially all of the buildings on either side of the avenue between Thirty-fourth and Forty-fourth streets were devoted exclusively to business purposes. The character of the buildings on the avenue has entirely changed. The purpose of the covenants, by reason of such change, can no longer be accomplished. If all the restrictions imposed should be strictly enforced it would not restore to the locality its residential character. The only effect would be to lessen the value of the property, without conferring a corresponding benefit upon any one. The property in the locality has, by reason of the change, become enormously valuable. The contract price of the lot in question was upwards of \$179 a square foot — nearly \$19,700 a foot on the avenue. Under such circumstances, it seems to me the height of absurdity to claim that a restrictive covenant not to erect a slaughter house, blacksmith's shop, stable, or manufactories of the kind specified, is an incumbrance of such a character as to prevent the passing of good title.

The case, in principle, therefore, is brought at least within the spirit of the rule laid down in *Columbia College v. Thacher* (87 N. Y. 311); *McClure v. Leaycraft* (183 N. Y. 36), and *Batchelor v. Hinkle* (210 N. Y. 243). (See, also, *Jackson v. Stevenson*, 156 Mass. 496; *Roth v. Jung*, 79 App. Div. 1; *Deeves v. Constable*, 87 App. Div. 352; *Schwarz v. Duhne*, 118 App. Div. 105; *Schefer v. Ball*, 120 App. Div. 880; affd., 192 N. Y. 589.)

In determining whether a court of equity will compel the observance of covenants restricting the use and occupation of real estate, each case must necessarily depend upon its particular facts. Upon the facts found in this case, I think it would be unjust and inequitable to hold the title of the lot in question unmarketable.

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The judgments appealed from, therefore, should be reversed and a new trial ordered, with costs to abide event.

COLLIN, HOGAN and CRANE, JJ., concur with CHASE, J., for affirmance; HISCOCK, Ch. J., and CUDDEBACK, J., concur with McLAUGHLIN, J., for reversal.

Judgments affirmed.

In the Matter of the Application of the CITY OF NEW YORK, Appellant and Respondent, Relative to Acquiring Wharf Rights Appurtenant to Pier Old No. 49, East River, and Appurtenant to Wharf Properties on or Near the Southerly Line of South Street in the Borough of Manhattan.

MUHLENBERG COAL COMPANY, Appellant and Respondent; FREDERICK W. ARMSTRONG et al., Respondents.

Eminent domain — New York (city of) — proceeding by city to acquire piers and dock property — rights of owners and lessees under revocable licenses from city — when entitled to damages for loss of business and destruction of buildings erected on piers.

1. The shedding permits issued by the department of docks of the city of New York by virtue of the provisions of chapter 249 of the Laws of 1875 are revocable, especially when containing the condition that they may be revoked in the pleasure of the board. (*Kingsland v. Mayor, etc., of N. Y.*, 110 N. Y. 569, followed.)

2. Such a license, although unrevoked, should have been valued by commissioners to assess the damages for the taking of such dock property by the city of New York as a shedded pier under a revocable license, one that could be revoked in accordance with these provisions of the charter, and not valued as a shedded pier under a irrevocable license. The claimant should also be allowed the structural value of a shed on the premises unless this be included in the pier value to be ascertained.

3. A corporation whose bulkhead privileges were condemned had carried on a coal business thereon for over twenty years, using it in connection with property across a street seventy feet wide, which was the only thing separating its upland property from the water,

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as one going business or enterprise. By the taking of the bulkhead by the city under condemnation proceedings, the business of the company has been destroyed and its property as a going plant greatly decreased in value. *Held*, that the fact that the bulkhead is separated from the other property by the street does not prevent an allowance to the claimant for the loss sustained to the plant as a whole. (*Matter of City of New York [Erie Railroad]*, 193 N. Y. 117, followed.)

Matter of City of New York (Pier Old No. 49), 185 App. Div. 539, modified.

(Argued May 21, 1919; decided July 15, 1919.)

APPEAL by the City of New York from an order of the Appellate Division of the Supreme Court in the first judicial department, entered January 10, 1919, which reversed an order of Special Term, denying a motion to confirm the report of commissioners of estimate in the above-entitled proceeding and modified and as modified confirmed said report. Appeal by the Muhlenberg Coal Company from so much of said Appellate Division order as modified the report of commissioners of estimate by striking out an award to it for damages to its plant as a whole.

The facts, so far as material, are stated in the opinion.

William P. Burr, Corporation Counsel (Charles J. Nehrbas and Charles D. Olendorf of counsel), for City of New York, appellant and respondent. The commissioners erred in valuing the pier upon the theory that the license or permit under which the pier was shedded was irrevocable. (*Matter of City of New York*, 117 App. Div. 553; *Kingsland v. Mayor*, 45 Hun, 198; *Langdon v. Mayor*, 133 N. Y. 628; *Matter of Pier Old 11, East River*, 124 App. Div. 465; 192 N. Y. 539; *Matter of City of New York [Pier Old No. 15, East River]*, 185 N. Y. 607; *Matter of City of New York [Piers Old Nos. 16 & 17, East River]*, 138 App. Div. 186; 199 N. Y. 570; *Williams v. Mayor, etc.*, 105 N. Y. 419; *Coverdale v. Edwards*, 155 Ind. 374; *McCabe v. City of New York*, 213 N. Y. 468; *Matter of City of New York [Ely Avenue]*,

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217 N. Y. 45; *Matter of Pub. Serv. Comm.*, 217 N. Y. 61.) Assuming that the shed license inured to the benefit of the claimants, and that it was not in fact revoked, it cannot be considered as an element of value in determining the compensation to be made for the taking of the pier. (*Matter of Piers 19 & 20, East River*, 117 App. Div. 553; *Kingsland v. Mayor, etc.*, 110 N. Y. 569.) The commissioners erred in making an award to the Muhlenberg Coal Company for "damages to plant as a whole." (*City of New York v. Rice*, 198 N. Y. 124; *Ackerman v. True*, 175 N. Y. 353; *Cohen v. Mayor, etc.*, 113 N. Y. 532; *Bates v. Holbrook*, 171 N. Y. 460; *People ex rel. Pumpyancky v. Keating*, 168 N. Y. 390; *Acme Realty Co. v. Schinasi*, 215 N. Y. 295.)

Charles A. Decker for Muhlenberg Coal Company, appellant and respondent. The use made by claimant of the bulkhead part of its plant was proper, and thereby in conjunction with its upland property, its business and plant were established and maintained, until destroyed by the taking of the bulkhead. (L. 1913, ch. 521; *Marshall v. Guion*, 11 N. Y. 461; *Taylor v. Atlantic Mutual Ins. Co.*, 37 N. Y. 275; *Langdon v. Mayor*, 93 N. Y. 150.) Just, i. e., complete, compensation should be awarded to the claimant for all damage resulting from the taking. (*Matter of City of New York [Erie Railroad Co.]*, 193 N. Y. 117; *Jackson v. State*, 213 N. Y. 34; *County of Erie v. Friedenberg*, 221 N. Y. 389; *Boyd v. United States*, 116 U. S. 616; *S. B. Ry. Co. v. Kirkover*, 176 N. Y. 301; Mills on Eminent Domain [2d ed.], § 168; *Omaha v. Omaha Water Co.*, 218 U. S. 180; *Bohm v. M. E. Ry. Co.*, 129 N. Y. 576; *Reisert v. City of New York*, 174 N. Y. 196; *Bagley v. Smith*, 10 N. Y. 489, 498; *Schill v. Brockhahus*, 80 N. Y. 614.)

William H. Harris, *George S. Mittendorf* and *Charles C. Keeler* for respondents. These appellants had good

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title to all of the property for which the awards were made. (*Bedlow v. N. Y. F. D. D. Co.*, 112 N. Y. 263; *Bedlow v. Stillwell*, 158 N. Y. 292; *Reformed P. D. Church v. Madison Avenue Building Company*, 214 N. Y. 268; *Ebling v. Dreyer*, 149 N. Y. 460.) The commissioners adopted no erroneous principle of law or rule of damages in arriving at the amount of the awards, and their conclusions as to value are abundantly sustained by the evidence. (*Perkins v. State of New York*, 113 N. Y. 660; *Matter of Furman Street*, 17 Wend. 649; *Boom Co. v. Patterson*, 98 U. S. 403; *Matter of N. Y., W. S. & B. R. R. Co.*, 35 Hun, 635; *Cooley on Const. Lim.* 708, § 568; *Pittsburgh, etc., Ry. v. Vance*, 116 Penn. St. 325; *Lewis on Em. Dom.* § 478; *Matter of William & Anthony Streets*, 1 Wend. 694; *Langdon v. Mayor, etc.*, 133 N. Y. 634; *Witmark v. N. Y. El. R. R. Co.*, 149 N. Y. 393; *Matter of Mayor, etc., of New York*, 74 App. Div. 346; *Eastman v. Mayor, etc.*, 152 N. Y. 474.)

CRANE, J. This proceeding was instituted on behalf of the city of New York by the commissioner of docks to acquire the wharfage rights not owned by the city appurtenant to pier old No. 49, East river, together with the wharfage rights appurtenant to certain bulkheads on the southerly side of South street adjacent to and in the vicinity of said pier. On the map attached to the petition parcel A was shown to consist of a bulkhead 72.18 feet in length west of Clinton street claimed to be owned by the Muhlenberg Coal Company. Parcel B consists of a bulkhead 29.3 feet in length adjoining pier old 49 on the west, and parcel C is a bulkhead 31.48 feet in length adjoining the pier on the east, both owned by Frederick W. Armstrong and others. Parcel D is a pier. It is described in the petition as 35.1 feet wide and about 325 feet long having an area of 11,440 square feet. This pier was also owned by Frederick W. Armstrong and others. The land under the water over which the pier

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was constructed and in front of the bulkheads was, however, owned by the city of New York.

The commissioners appointed by the Supreme Court to assess the damages for the taking of this property awarded for the parcels B, C and D, which were used in conjunction, \$250,000. They awarded to the Muhlenberg Coal Company for its bulkhead rights, parcel A, \$21,654 and for damage to its plant as a whole \$20,000.

The Special Term refused to confirm the report and referred the matter back to new commissioners. This order was reversed by the Appellate Division and the awards were reinstated with the exception of the allowance of \$20,000 to the Muhlenberg Coal Company for damages to the plant as a whole. The disallowance of this amount was affirmed.

The appeal to this court brings up for review two questions: *First*, the valuation of the pier as a shedded pier under an irrevocable license, and *second*, the disallowance of the damages sustained by the Muhlenberg Coal Company through the depreciation of its entire plant by the taking of its wharfage rights and privileges.

On this pier there had been erected since about 1879 a wooden shed covering the greater part of its surface. Its value was about \$1,000. A permit for its erection was granted by the board of docks of the city of New York, and it is conceded that if the permit were irrevocable the value to the claimants of the pier as a shedded pier under an irrevocable permit was of much greater value than an unshedded pier or one shedded under a revocable permit. As a shedded pier under an irrevocable license the value was placed by one expert at \$350,000. As an unshedded pier, or as a shedded pier under a revocable license, another expert placed the value at \$96,590. The commissioners wrote an extensive and able opinion in which they said after reviewing the authorities:

"For these reasons it seems to us clear that the permit to shed was irrevocable and belonged to the claimants

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and, therefore, that they are entitled to be compensated upon the basis of the existence of the pier as a shedded pier at the time title was taken by the city."

The Appellate Division stated the matter in these words:

"The only real question is whether the award should have been made on the theory that the permit was revocable or on the theory that it was irrevocable. That is a question that perhaps has not been finally authoritatively decided with respect to such a permit as this which contained no condition such as that the holder in the event of condemnation should claim no award on account of the permit but merely the recital that it was subject to the pleasure of the commissioner." (185 App. Div. 539, 548.)

Considering that the point had not been raised by proper objection, the city presenting its evidence solely upon the theory of an unshedded pier, the Appellate Division passed this question and affirmed the award of the commissioners. We think this question was presented and that we must pass upon it.

The commissioners valued the pier as one existing under an irrevocable shedding license. The city offered evidence of value as an unshedded pier. It went further. Martin McHale, its expert, testified that the value of the pier under a license revocable at the pleasure of the board, but not revoked at the time of this proceeding, was worth no more than an unshedded pier, to wit, \$96,590. An objection was made by the city to the valuation of the pier by the claimant as a shedded pier in these words:

"Mr. Olendorf: Then I object to any proof as to the value of the pier as a shedded pier on the ground that the license for the shedding of that pier was revocable in its nature and was revoked by the Commissioner of Docks, the Commissioners of the Sinking Fund and the Mayor prior to the vesting of title in this proceeding,

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in the manner permitted and described by Section 844 of the Charter."

The fact that the city also claimed that the permit had been revoked did not weaken or nullify its objection to the treatment of the pier as a shedded pier under a license which could not be revoked.

This much of the record shows that this court must pass upon the right of the commissioners to value this pier as shedded under an irrevocable license.

Piers with or without shedding licenses have been the subject of other litigations reported in the books and the laws affecting them and the reasons for the increased value with shedding privileges have been frequently and fully stated. No more is required here than to refer to these cases and the statutes in so far as they may make clear our position.

Prior to chapter 249 of the Laws of 1875, known as the Shedding Act, it was unlawful to erect structures of any kind upon piers in the waters about the city of New York. (*People v. Mallory*, 46 How. Pr. 281; *People v. B. & O. R. R. Co.*, 117 N. Y. 150; *Kingsland v. Mayor, etc., of N. Y.*, 45 Hun, 198; 110 N. Y. 569.)

That law provided:

"Section 1. Whenever any person, company or corporation, engaged in the business of steam transportation, shall be the owner or lessee of any pier or bulkhead in the city of New York, and shall use and employ the same for the purpose of regularly receiving and discharging cargo thereat, it shall be lawful for such owner or for such lessee, with the consent of the lessor, to erect and maintain, upon such pier or bulkhead, sheds for the protection of property so received or discharged; provided, they shall have obtained from the department of docks, in said city, a license or authority to erect or maintain the same, and subject to the conditions and restrictions contained in such license or authority. All sheds or structures heretofore erected or maintained upon any wharf or

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pier in the city of New York, under any license or permit granted by the department of docks in said city, are hereby declared to be lawful structures subject to the terms and conditions of the license or permit authorizing the same. Such sheds shall be constructed subject to the regulations and under the authority of the superintendent of buildings and the department of docks."

"Section 2. Any such owner or lessee of a pier, or of a pier and bulkhead, or of a part thereof in respect to which the department of docks shall have granted the license or authority specified in section one of this act, shall be entitled to the use of the premises so owned or leased by them, and no vessel shall be placed in any berth on such pier or bulkhead, or part thereof, without the consent of such owner or lessee, during the continuance of such license."

The lessee of pier old No. 49 East river was the Central Vermont Railroad Company, which pursuant to this act obtained a shedding permit or license on December 24th, 1879, by the following resolution:

"Resolved, That permission be and hereby is granted to the Central Vermont R. R. and steamer line, lessee of Pier 49, East River, to erect and maintain, during the pleasure of this board, a shed to cover said pier, for the protection of property received and discharged thereat by steam transportation; said shed to be constructed subject to the regulations of the Superintendent of Buildings, as required by Chapter 249, Laws of 1875, and in accordance with plans to be first submitted to and approved by the engineer in chief of this department, and all the work to be done under the supervision of that officer."

The increase in value of a shedded pier was due to its exclusive use by a lessee or owner whereas an unshedded pier was open to the public. (*Kingsland v. Mayor, etc., of New York, supra.*)

Prior to this Shedding Act the department of docks

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had been created by chapter 574 of the Laws of 1871. It was given exclusive charge and control of all wharf and pier property. The board was directed to prepare plans for the water front and to proceed to lay out and construct wharves and piers according to them. The plans were to be filed in the office of the board, open to public inspection. Notice of their adoption was also to be given by advertisement. In April of 1871 such plans were adopted and filed for the location in question. They were offered in evidence in this proceeding.

It is fair to assume that when the license was given to the Vermont Central Railroad Company, as above stated, the city authorities had in mind the plans for this shore front improvement as adopted and filed. This explains why the license was limited to the pleasure of the board.

This court in the *Kingsland Case* (*supra*) said:

"In 1875 an act was passed, commonly known as 'the shedding act,' which authorized the department of docks to grant permits for the maintenance and construction of sheds upon the piers or bulkheads, but these permissions were revocable in their nature, without consideration, and expressly subject to the rules and regulations of the department of docks to whose discretion the matter was confided. * * * The license of the dock department to plaintiff's lessee was after the passage of the act of 1871, and by its very terms was operative only during the pleasure of the city. Those who received it knew when they received it that it conferred no fixed property right, but merely a privilege which the city might withdraw at any moment, and that the plan of 1871 contemplated and would compel that withdrawal." (pp. 583, 580. See, also, opinion of DANIELS, J., in this same case reported in 45 Hun, 198.)

The reading of this act of 1875, the terms of the permit issued to the Vermont Central Railroad Company, this expression of our court in 1888 would seem to make it very clear that in view of the proposed and impending

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changes along the city's water front any shedding permits were but temporary and could be revoked when the authorities determined upon the execution of the plans. We find nothing in the law or in the situation which suggests that they should or would be irrevocable. The parties obtaining the permits for their own benefit and profit as well as the improvement of shipping conditions could take them or leave them, but if accepted, it would be upon the terms and conditions imposed. No reason can be suggested why the city should be obliged to pay for the increased value of a pier due to its own act in issuing a shedding privilege. If the permits cannot be revoked this increase is not simply the value of the shed, but a much greater amount due to the license or permit to have the shed. The value is added by the act of the city. It is added when the city officials know that in the course of time the property must be purchased or condemned. When the city condemns, it is said, it must pay for this increased value which it voluntarily and without consideration has given to the owner. But why should it thus unnecessarily give away value, or, in other words, the city's money?

Reason as well as duty dictates that the statements of the *Kingsland* case should be followed, and that these permits and licenses are but temporary and revocable when a contemplated improvement is begun.

The commissioners and the court below have been of the opinion that this court has held in subsequent cases that the permit once granted was irrevocable even when containing a condition that it was granted only during the pleasure of the board of docks. The language in some of the Appellate Division decisions has justified this conclusion, but an analysis of the matter actually decided leads us to the conclusion that the views expressed in the *Kingsland* case have not been overruled, and that the nature of these permits has not been changed. In *Matter of City of New York, Pier No. 15* (95 App. Div.

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501) the permit to erect a pier shed issued by the dock department in 1887 pursuant to the Laws of 1875, chapter 249, section 3, contained no conditions or limitations whatever. There was no power reserved to revoke it. It is true that in the opinion these words were used:

"There being no authority given to the dock department to revoke such license or authority when once given, when that authority was given the structure became by the force of the legislative enactment a lawful structure." (p. 505.)

Further in the opinion, however, the judge writing calls particular attention to the exact facts of the case by saying:

"There was nothing in the resolution that reserved the right of the city to revoke the authority once given, and that authority having been given the right to erect and maintain that shed vested, by virtue of the statute, in the owners of the pier." (p. 506.)

When the case came to this court (185 N. Y. 607, affirming 113 App. Div. 903) the opinion of the Appellate Division was not approved although the order was affirmed. This court said:

"While we do not assent to the doctrine that the right of the pier owners to an exclusive use of the pier as a shedded pier, and to be relieved of the burden of having vessels put in at the wharf was beyond legislative repeal or modification, still, as at the time this property was acquired by the city no such repeal had been made, the value of the property was to be estimated under the existing conditions of the law. While the report states that the award was made upon the theory of the right being in perpetuity, still the entire record discloses that it was made in accordance with the true rights of the parties."

In *Matter of City of New York (Piers Old Nos. 19 & 20)* (117 App. Div. 553) the permit was construed

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by the court to be of the same character as that passed upon in *Matter of City of New York (Pier No. 15)* that is, a permit without restriction or condition or power of revocation reserved. The opinion, however, distinctly states that if the resolution or permit of the dock department had contained a limiting clause the decision would have been different, as the dock department could attach restrictions and conditions to sheds erected for the first time after 1875 and could make them revocable.

It will be noted at this point that the shed in question on pier old No. 49 was erected in 1879.

In *Matter of City of New York (Pier Old No. 11, East River)* (124 App. Div. 465) permission was granted to the owners of pier 11, East river, to erect a shed on said pier upon the owner filing a written agreement that in the event that the commissioner of docks should decide that said pier was needed for the improvement of the water front that then, and in such case, no additional item of value was to be claimed or allowed by reason of the erection of the shed. The commissioners, in assessing value, considered this a revocable license and awarded damages for an unshedded pier only. This rule was affirmed by the Appellate Division and by this court (192 N. Y. 539).

The opinion of the Appellate Division states:

"We are of opinion that the owners were not entitled to have the pier valued as a shedded pier. The decision of this question depends upon the validity of and the construction to be placed upon the license or permit for the erection of the shed. * * * Accordingly, instead of denying the application, he [the commissioner of docks] granted it upon conditions which would enable the owners and lessee to have the benefit of the use of the pier as a shedded pier until such time as he or his successor in office should institute proceedings to acquire the property, but at the same time protecting the city against an increased valuation based upon the fact that

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the license or permit had been granted, and he also incorporated a provision manifestly designed to relieve the city, when it should become necessary to acquire this property, from paying any added value on account of the shed itself as a structure or building. It seems quite clear that the owners and lessee are not in a position now to question the authority of the commissioner of docks to exact these conditions. Although the question is not now presented for decision, it may be observed that the view has been expressed in some cases, if indeed the point has not been decided, that the granting or withholding of such permit or license rests in the sound discretion of the commissioner, and that the property owner or tenant is not entitled thereto as matter of right." (pp. 470, 472.)

This case of *Pier Old No. 11, East River*, was distinguished in *Matter of City of New York (Piers Old Nos. 16 & 17)* (138 App. Div. 186) as being based upon an agreement. It was there stated that a permit given upon condition that the owner file a consent not to claim additional value for the shedded pier when taken in condemnation was different from a permit containing a clause making it revocable in the pleasure of the board. We do not appreciate the distinction. The filed statement that the permit is accepted upon such conditions is of no more force than the acquiescence or implication arising from the acceptance of the permit without objection containing such restrictions. An act may be as expressive as a word. If the dock department had no authority to issue a revocable license it likewise had no authority to compel the owner to consent in writing that it should be revocable. Official authority proceeds from the legislature and not from the consent or acquiescence of individuals.

While the order in *Piers Old Nos. 16 & 17* was affirmed by this court (199 N. Y. 570) it by no means follows that all that was said in the opinion of the Appellate

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Division was likewise adopted. The award in that case was not for pier privileges but for shed property physically taken by the city. James E. Ward & Co., the lessee, was awarded \$6,737.27 for an iron shed and \$4,817.60 for a wooden shed. The report of the commissioners so reads. We do not, therefore, consider this case as binding this court to the proposition that a permit, by its terms and conditions made revocable, is beyond the power of the authorities to revoke.

These cases, we must concede, have not left the law as clear and precise as one might wish, but confining them to the facts we find the rule still to be as stated in the *Kingsland* case, that the shedding permits issued by the department of docks are revocable, especially when containing the condition that they may be revoked in the pleasure of the board.

We do agree with the courts below, that the permit in this case had not been revoked. Section 844 of the Greater New York charter (Laws of 1897, chapter 378, re-enacted by chapter 466 of the Laws of 1901) contained express legislative authority for the revocation of shed licenses. It provides:

“But when such license or authority has been granted and has been acted upon, it shall not be revoked by said commissioner without the consent in writing of the mayor and of the commissioners of the sinking fund, after due hearing of such licensee.”

These provisions of the charter applied to the license in question. While the necessary consents were given the notice of a hearing was not such as the law prescribed or intended. The city knew that the Vermont Central Railroad Company had ceased for many years to be lessee of this pier and that the New York, New Haven and Hartford Railroad Company was in possession. They gave notice neither to the owners or to the lessee in possession and the attempted notice to the Vermont Central Railroad Company was futile.

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Considering, however, the license as unrevoked the pier should have been valued by the commissioners as a shedded pier under a revocable license, one that could be revoked in accordance with these provisions of the charter. It should not have been valued as a shedded pier under an irrevocable license. That there is or may be a difference in value is indicated by the testimony above referred to. (*First Construction Co. v. State of New York*, 221 N. Y. 295.)

As the city has apparently taken the shed and leased it to other parties the claimant should also be allowed its value, the structural value, unless this be included in the pier value to be ascertained.

We will now consider that part of the award which gave the Muhlenberg Coal Company \$20,000 damages for the injury to its plant. The commission found that this sum represented the difference between the value of the plant as it was before the bulkhead was taken and its value after it was taken. Its authority for this award was stated to be *Matter of City of New York (Erie Railroad)* (193 N. Y. 117). The proceeding there was for the condemnation of all rights of wharfage along the westerly side of Thirteenth avenue extending from West Twenty-third street to West Twenty-second street. Attached to this bulkhead was a platform and float bridge maintained by the Erie Railroad Company under a revocable license from the city. The railroad company also under a revocable permit had laid and maintained across Thirteenth avenue three railroad tracks by means of which its structures on the water side of Thirteenth avenue were connected with its freight yard on the east side of Thirteenth avenue. This freight yard was equipped with sheds, platforms, tracks and other things which were essential to its use as a component part of the whole plant consisting of several structures and improvements. The commissioners held that the loss to the railroad company of its structures and fixtures

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consequent upon their severance from the bulkhead rights which were condemned, was *damnum absque injuria* and reported against the railroad company's claim. This court reversed this finding and remitted the proceeding to the commissioners to assess the damages to the physical equipment of the railroad company which was rendered useless or less valuable by the city's appropriation of the bulkhead rights.

We think the situation in this case is quite similar and requires the application of the same rule.

The Muhlenberg Coal Company, for over twenty-two years, had carried on the business of buying and selling coal at retail at 281, 282 and 283 South street across the way and opposite to the bulkhead condemned. At this point South street was seventy feet wide and was the only thing separating the company's upland property from the water. On the premises was a reinforced concrete building covering the whole plot. This property, together with the machinery and bulkhead rights and privileges, was used as one going business or enterprise. Situated on the bulkhead was a steam shovel. Boats were pulled up alongside of the bulkheads where the steam shovel took the coal from the bulkhead to a hopper which was a part of the unloading apparatus. Carts were driven under the unloading apparatus, loaded and transported across the street where the coal was elevated to the pockets by means of an endless chain conveyer. These coal pockets were fifty feet in height, forty feet in width, sixty feet in depth, built of reinforced concrete with three twelve-foot driveways through underneath, and eighteen-foot driveway on either side and held about 2,300 tons of coal. The pockets together with the eighteen-foot driveways on each side covered the premises with the exception of the office building located in front fourteen feet in depth and three stories high.

The structural value of the coal pockets and machinery was about \$32,000. From October 1st to April 15th

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in every year the coal company had five coal barges continually unloading at the bulkhead and from April 15th to October 1st one or two barges. The business was what is known as a "water front coal yard," much more valuable than an inland coal yard. The plant was located in a very populous neighborhood and its annual net profit for seven years immediately preceding the taking of its bulkhead was \$3,481.02 on average sales of 43,403 tons a year. The city, by this proceeding, has taken the company's bulkhead rights and leased 55.81 feet thereof to the New York, New Haven and Hartford Railroad Company in connection with the shedded pier and other property. After such taking the coal company was obliged to draw its coal from pier No. 36 East river, about 450 feet from its pockets, which it cannot now do at a profit. Its business has been destroyed and its property as a going coal plant greatly decreased in value. There seems to be little question as to the amount of damage sustained by the Muhlenberg Coal Company or as to the reasonableness of the award made by the commissioners. The determining point below was that the bulkhead rights being separated from the other property by a seventy-foot street, damages could not be allowed for a loss sustained to the plant as a whole. Although the city had issued permits for the use by the claimant of a steam boiler and hoisting apparatus in South street to raise the coal from the barges to its carts it is said that these permits were illegal as authorizing nuisances and an improper use of South street. Whatever rights the Muhlenberg Coal Company had under the deed to it and its predecessors in title from the city by reason of craneage privileges in South street or on the bulkhead, we need not now consider. Even if the steam apparatus were improperly in the street there is evidence that the coal could have been lifted from the barges to the carts by "floating diggers" placed alongside the barges as has been done in the

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city by other coal dealers. The commissioners found that the existence of the unloading apparatus at the point at which it existed was not an essential factor in the operations of the claimant.

It is further said that the Muhlenberg Coal Company had no exclusive use of the wharfage rights, and that the same were under the control and regulation of the dock department.

The rights, in this instance, might well be valued according to the long-established usage. For over twenty-two years sufficient wharfage privileges were provided to establish and maintain a fairly profitable coal business. With the taking of these rights the tangible property of the company has depreciated in value. We can see no real distinction in principle between this and the *Erie Railroad Company* case. The fact that the transportable property of the railroad company was taken from wharf to upland on tracks over a public street is not essentially different from the taking of coal from barges in carts over an intervening highway to adjoining coal pockets. The methods of operation might be different but the law applicable should be the same.

Evidence was offered before the commission which need not here be detailed to show that the Muhlenberg Coal Company has sustained about \$45,000 in damage. There was ample evidence to justify the commission in awarding \$20,000. This finding should not have been disturbed.

For the reasons here given so much of the order of the Appellate Division as affirms the award of \$250,000 for parcels B, C and D should be reversed and the matter remitted to Special Term for a reapportionment of damages under the rule here stated either before the same or a new commission. That part of the order of the Appellate Division affirming the order of the Special Term setting aside the award of \$20,000 damages to the Muhlenberg Coal Company should be reversed and the report of the

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commission in this particular affirmed. In all other respects the order of the Appellate Division should be affirmed.

COLLIN, CUDDEBACK, CARDOZO and ANDREWS, JJ., concur; POUND, J., dissents; Hiscock, Ch. J., taking no part.

Orders reversed, and report of commissioners confirmed so far as the award of damages to Muhlenberg Coal Company for injury to plant, with costs in all courts to said claimant. Order of Appellate Division so far as it reverses order of Special Term denying confirmation of report of commissioners awarding \$250,000 for parcels B, C and D, and directing reappraisal, etc., reversed and that of Special Term affirmed, with costs to abide event. Otherwise order affirmed, without costs.

In the Matter of the Application of WILLIAM REISFELD et al., Copartners, under the Firm Name of REISFELD & CYMBERG, Respondents, to Enforce an Attorney's Lien.

THE NATHAN MANUFACTURING COMPANY, INCORPORATED,
Appellant.

Attorney and client — an agreement by an administrator to pay an attorney a certain percentage of the recovery for the death of the administrator's child is only binding on his share thereof.

1. The father of an infant child, who has been appointed an administrator to bring an action for damages for the death of the child, may bind his own interest in the recovery by an agreement to pay attorneys a specified contingent fee, but he cannot, without the consent of the child's mother, who is entitled to one-half of the recovery (Code Civ. Pro. § 1905), bind her interest therein as to the amount of such fee. The lien upon the mother's share of the recovery must be restricted to a reasonable amount fixed by the court. (Code Civ. Pro. § 1903.)

2. It is unimportant that the father fixed the terms of the retainer before his appointment as administrator. By prosecuting the action

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after appointment, he approved and continued the arrangement. The attorneys have a lien upon his share for one-half of the contingent fee agreed upon by him.

Matter of Reisfeld, 187 App. Div. 223, modified.

(Argued September 29, 1919; decided October 14, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 4, 1919, which modified and affirmed as modified an order of Special Term in a proceeding to establish an attorney's lien.

The facts, so far as material, are stated in the opinion.

Henry Bogert Clark and Amos H. Stephens for appellant. There is no proof of a valid contract of retainer between the plaintiff and petitioners. (*Matter of Snyder*, 190 N. Y. 66.) Assuming that there was a valid contract of retainer the petitioners are nevertheless entitled only to the reasonable value of the services performed. (*Tenny v. Berger*, 93 N. Y. 524; *Matter of Snyder*, 190 N. Y. 66; *Matter of Dunn*, 205 N. Y. 398; *Andrews v. Haas*, 214 N. Y. 255; *Martin v. Camp*, 219 N. Y. 170; *Matter of City of New York*, 219 N. Y. 192; *Bathgate v. Haskins*, 59 N. Y. 533.) The petitioners having failed to show that the contract upon which they base their claim was for a reasonable compensation cannot enforce the contract. (*Matter of Atterbury*, 222 N. Y. 355.)

Isidor Enselman and John G. Dyer for respondents. Defendant having settled this case with plaintiff, with full knowledge of petitioners' lien, it was error to disregard the provision for compensation contained in the contract of retainer. (*Guistino v. Mahoney*, N. Y. L. J. Aug. 12, 1910; *Matter of Winkler*, 154 App. Div. 532; *Pilkington v. Brooklyn Heights R. R. Co.*, 49 App. Div. 22; *Fischer-Hansen v. Brooklyn Heights R. R. Co.*, 173 N. Y. 493; *Ransom v. Ransom*, 147 App. Div. 835, 849; *Murray v. Waring Hat Mfg. Co.*, 142 App. Div. 514; *Morehouse v. Brooklyn Heights R. R. Co.*, 195 N. Y. 520; *Matter of Fitzsimmons*, 174 N. Y. 15.)

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CARDOZO, J. This is a proceeding by attorneys to establish and enforce a lien.

The infant child of Morris and Clara Nacht was run down and killed by an automobile truck in the city of New York. The father retained the petitioners to bring an action for damages. Their compensation was to be fifty per cent of any recovery by settlement or verdict. They caused the father to be appointed administrator, wrote the owner of the truck a letter of demand for payment, and thereafter served a summons. They had no opportunity to do anything more. The action was settled without their intervention, and \$1,000 paid, and divided between the parents. In this proceeding, the attorneys seek to charge the defendant with a lien to the extent of fifty per cent of the sum recovered through the settlement. The Special Term held that the lien must be restricted to the reasonable value of the services, which was found to be \$150. The Appellate Division held that the lien must be measured by the contract, and modified the award accordingly.

We think the modification goes too far. The petitioners were dealing with an administrator. The proceeds of the cause of action belonged equally to the father and the mother (Code Civ. Pro. sec. 1905). Upon his own interest in the cause of action, the father might impose any lien that he pleased (Judiciary Law, sec. 474; Consol. Laws, ch. 30). Upon the interest of his wife, he could not lay a charge beyond the limits of the reasonable (Code Civ. Pro. sec. 1903; *Matter of Atterbury*, 222 N. Y. 355, 360, 361). There is evidence justifying a finding that the administrator had ignored that restraint upon his power. The Appellate Division reversed upon the law (Code Civ. Pro. sec. 1338), and the determination of the Special Term must stand if it has any basis in the facts. By this contract, the half of any settlement, no matter how made or when, was to go to the attorneys. Whether they did much or little or substantially nothing,

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their reward was to be the same. The result, if the contract stands, is to give them \$500 for some preliminary investigation of the accident and the service of a summons. Had the settlement been larger, they would have a claim for even more. We cannot say that the Special Term was under a duty to approve as reasonable a contract leading to such results. The father is bound, because he assented, and there is no finding of mistake or fraud (Judiciary Law, sec. 474; *Matter of Fitzsimons*, 174 N. Y. 15; *Morehouse v. B. H. R. R. Co.*, 185 N. Y. 520; *Matter of Howell*, 215 N. Y. 466, 472; *Boyd v. Daily*, 85 App. Div. 581; 176 N. Y. 613; *Elmore v. Johnson*, 143 Ill. 513; *Cooley v. Miller*, 156 Cal. 510, 524; *Taylor v. Bemiss*, 110 U. S. 42). The mother is free, because she did not assent, and hence the contract must be reasonable when it imposes a charge upon her right. The fee may be made contingent (*Lee v. Van Voorhis*, 78 Hun, 575; 145 N. Y. 603); its size may be increased because of the contingency; but none the less, the bargain must exhibit a measurable degree of providence in the adjustment of reward to service. If such providence is lacking, the administrator will not bind others, even though he binds himself. The test to be applied should be substantially the same as that applied under section 474 of the Judiciary Law to contracts with a guardian.

These principles determine the extent of the lien and the distribution of its burdens. The share of the father in the cause of action and its proceeds is subject to a lien of \$250, one-half of the promised fee. If he is liable for more, the remedy is against him personally. He did not charge his share with the whole fee, but only with his proportion of the fee which he attempted to charge upon the cause of action as a whole. The interest of the mother is subject to a lien of \$75. That is her proportion of the reasonable value. Those are the amounts which the surrogate or the Supreme Court would have charged against the shares of the parents if appli-

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cation had been made in advance of the completed settlement to adjust the lien of the attorneys. Those, therefore, are the payments that must be made to the petitioners now.

We think it unimportant that the father fixed the terms of the retainer before his appointment as administrator. By prosecuting the action after appointment he approved and continued the arrangement. We think also that at the time of the settlement the petitioners employment had not been terminated by the client, and hence that the case is not brought within the rule in *Martin v. Camp* (219 N. Y. 170, 174). The defendant makes some point of the omission to produce the written contract. Its terms, however, are stated in the petition, and the statement is not opposed by any adequate denial.

The order of the Appellate Division should be modified by reducing the lien to the sum of \$325, and as modified affirmed, without costs to either party in the Appellate Division or in this court.

HISCOCK, Ch. J., CHASE, HOGAN, POUND and ANDREWS, JJ., concur; McLAUGHLIN, J., dissents and votes to affirm the order of the Special Term

Ordered accordingly.

In the Matter of the Accounting of THOMAS MORRIS,
et al., as Executors of CATHERINE GOREY, Deceased,
Appellants.

OWEN EDWARDS et al., Respondents.

Will — construction — charitable trust — masses — when will clearly and explicitly expresses the desires of a testatrix creating a charitable trust the court will not bestow her estate upon next of kin upon a claim that the gift is unreasonable in amount for the purposes of the trust.

1. Where a testatrix, after making certain bequests, bequeathed the residue and remainder of her estate to her executors "to pay funeral expenses, say masses and put a modest tombstone over my remains," the executors took title to the residuary estate in trust and it is their

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duty, after paying funeral expenses and for a monument, to dispose of the remainder of the residuary estate by having masses said in a Roman Catholic church, according to the customs of that communion. The testatrix was free to judge for herself what was reasonable in amount for the purposes of the trust. The trust was not void for indefiniteness and the court will not take the estate from the trustees to bestow it upon the next of kin in disregard of the expressed desires of testatrix, but will uphold the will as it is written.

2. Masses are religious ceremonials and a bequest therefor is upheld as a charitable trust.

Matter of Morris, 188 App. Div. 894, modified.

(Argued September 29, 1919; decided October 14, 1919.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the second judicial department, entered April 5, 1919, which affirmed a decree of the Kings County Surrogate's Court judicially settling the accounts of the executors of Catherine Gorey, deceased.

The facts, so far as material, are stated in the opinion.

David Joyce and *Ralph G. Barclay* for appellants. Paragraph 8 of the will must be construed as a gift in trust rather than simply a direction to the executors to pay funeral expenses, say masses and erect a tombstone, and such being the construction of the paragraph, the corpus of the gift cannot be cut down, as there is nothing in the will to uphold such a construction. (*Gross v. Moore*, 68 Hun, 412; *Matter of Keenan*, 107 App. Div. 234; *Matter of Arrowsmith*, 162 App. Div. 623; 213 N. Y. 624; *Matter of McAvoy*, 112 App. Div. 377; *Stewart v. Franchetti*, 167 App. Div. 541.) The bequest in trust is not invalid. (*Matter of Raab*, 42 App. Div. 141; *Cunningham v. Parker*, 146 N. Y. 24; *Matter of McDowell*, 217 N. Y. 454.)

William G. Cooke and *Howard O. Wood* for respondents. Clearly the bequest contained in the eighth clause was not to the executors as individuals, but it was merely for the purposes enumerated. (*Matter of Raab*, 42 App. Div. 141; *Matter of Arrowsmith*, 162 App. Div. 623; *Matter*

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of *Keenan*, 107 App. Div. 234; *Gross v. Moore*, 68 Hun, 412; 141 N. Y. 559.) The executors are authorized merely to spend a reasonable sum for the saying of masses, and that having been done the property passes to the next of kin. (*Steinway v. Steinway*, 163 N. Y. 184; *Matter of Backes*, 9 Misc. Rep. 504; *Matter of Boardman*, 46 N. Y. S. R. 444; *Matter of Young*, 92 Misc. Rep. 633.) Such a trust as the appellants claim was created here is void, for the reason that it could never be enforced. (*Holland v. Alcock*, 108 N. Y. 312; *Reynolds v. Reynolds*, 224 N. Y. 429.)

POUND, J. The testatrix, an aged widow, made her will on June 10, 1916. She died shortly thereafter and letters testamentary were issued to the executor and executrix therein named. She left seventeen nephews and nieces in Wales, her only next of kin. By her will she makes pecuniary legacies to seven of them in various amounts aggregating \$10,000. She also gives \$100 to "my friend Susie Ternan" and \$300 to "my faithful friend Catherine Morris," to whom she also gives all the personal property in the house. Catherine Morris and her husband, since deceased, are named as the executors of the will. Paragraph eighth of the will reads as follows: "I bequeath all the rest, residue and remainder of my estate to my executor hereinafter named to pay funeral expenses, say masses and put a modest tombstone over my remains."

The residuary estate amounts to nearly \$6,000 and the courts below have sustained the contention of one of the next of kin that this bequest should be limited to an amount necessary to fulfil the objects designated, which has been fixed at \$187.50 for funeral expenses, \$5.00 for a funeral mass and \$350.00 for monument, leaving for the next of kin, as unbequeathed assets of the estate, upwards of \$5,000. It is said that in law testatrix intended only to have so much of the estate

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expended for these purposes as would be suitable to her condition of life and that the balance should go to the next of kin.

The intention of the testatrix is not thus expressed. The next of kin are remembered and provided for. The law permitted, if it did not require, the executors, without any directions from the testatrix, to expend for funeral expenses, including the funeral mass and the monument, as much as has been expended for such purposes from this estate, and it is not to be inferred that her words were superfluous and without meaning. It seems perfectly clear that she intended the residue of her estate to pass to her faithful friend and her faithful friend's husband to be expended for the purposes designated by her and that she did not intend to die in partial intestacy. The words of gift are explicit. The distinction between an absolute gift and a direction to expend a given sum for a given purpose is pointed out in *Matter of Arrowsmith* (162 App. Div. 623; affd., 213 N. Y. 704), and it is held that the court may not cut down the gift because the amount is disproportionate to the purpose.

But it is urged that this is a gift in trust and that the statement of purpose is, therefore, limited to a reasonable amount beyond which the trustees may not take. This contention does not fortify the claims of the next of kin. The testatrix was free to judge for herself what was reasonable. "Masses are religious ceremonials or observances of the church of which she was a member, and come within the religious or pious uses which are upheld as public charities." (*Schouler, Petitioner*, 134 Mass. 426.) She could give her estate outright to any charity and she was free to dedicate it to this particular charity. Although the specific objects of the charity are not named by the testatrix, the trust is no longer void for indefiniteness in this state. (*Holland v. Alcock*, 108 N. Y. 312; *Matter of MacDowell*, 217 N. Y. 454.) The construction which upholds the main purpose of the testatrix is that

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the executors shall take title to the residuary estate in trust and that they shall, after paying funeral expenses, dispose of the estate by having masses said in a Roman Catholic church, according to the customs of that communion. The test of reasonableness has no place as between the next of kin and the charitable trust, and the court will not take the estate from the trustees to bestow it upon the next of kin in disregard of the expressed desires of testatrix, but will, "in a broad and liberal spirit" uphold the will as it was written.

The order of the Appellate Division and decree of surrogate appealed from should be modified by directing the payment of the entire residuary estate to the executors in trust for the purposes named in the will, and as so modified affirmed, with costs in all courts to the appellants, payable out of the estate.

HISCOCK, Ch. J., HOGAN, CARDODOZ, McLAUGHLIN and ANDREWS, JJ., concur; CHASE, J., not voting.

Ordered accordingly.

In the Matter of the Claim of JOHN B. LORD, Respondent,
against the Estate of SAMUEL E. HASLETT, an Incompetent Person.

BROOKLYN TRUST COMPANY et al., as Committee of the Property of SAMUEL E. HASLETT, an Incompetent Person, Appellants.

Incompetent persons — when committee of an incompetent not required to pay a claim which the incompetent, if restored to health, would probably not have paid.

In a proceeding to compel the committee of an incompetent to pay the expenses of the petitioner in an action brought against him, it appeared that the petitioner, acting upon his own initiative, took charge of the property of the incompetent and looked after him and his affairs, when his mind became impaired; in so doing the petitioner questioned the validity of a power of attorney given by the incompetent

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to another, and caused such attorney in fact and another to be indicted for conspiracy. The defendants were acquitted. Thereafter they brought actions against petitioner for malicious prosecution, which actions were compromised and settled by petitioner, who now asks that the expenses of defending the actions and the amount paid by him on the settlement be repaid him out of the estate of the incompetent. The committee of the incompetent was not a party to the actions against petitioner or consulted with reference thereto. *Held*, that the petition sets forth no facts sufficient to sustain an order requiring the committee of the incompetent to pay any part of the claim.

Matter of Haslett, 188 App. Div. 208, reversed.

(Argued October 1, 1919; decided October 14, 1919.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 6, 1919, which reversed an order of the Kings County Court denying an application for an order directing the committee of the property of Samuel E. Haslett, an incompetent person, to pay the expenses incurred by petitioner in defending certain actions brought against him for malicious prosecution and sending the petition back to the County Court for consideration.

The following question was certified: "Does the petition herein state facts sufficient to justify the court in granting to the petitioner equitable relief as prayed for therein?"

The facts, so far as material, are stated in the opinion.

Jackson A. Dykman for appellants. Petitioner's conscious wrongdoing gives no right to indemnity. (*Gilbert v. Finch*, 173 N. Y. 455; *St. John v. St. John's Church*, 15 Barb. 346; *Bridgeport Fire Ins. Co. v. Wilson*, 34 N. Y. 281; *Vil. of Port Jervis v. First Nat. Bank*, 96 N. Y. 550.)

Conrad Saxe Keyes for respondent. The court having the custody of the estate of an incompetent person has power to grant this application. (*Matter of Heeney*,

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2 Barb. Ch. 326; *Matter of Strickland*, L. R. 6 Ch. App. 226; *Matter of Carysport*, Cr. & P. 76; *Matter of Whitbread*, 2 Mer. 299; *Matter of Whitaker*, L. R. 42 Ch. Div. 119; *Matter of Willoughby*, 11 Paige, 257; *Matter of Larnier*, 68 App. Div. 320; *Matter of Andrews*, 56 Misc. Rep. 15; *Matter of Wallace*, 172 App. Div. 544; *Matter of Maxwell*, 218 N. Y. 88.) An agreement of indemnity should be implied in law. (*Griffiths v. Hardenbergh*, 41 N. Y. 464; *Carter v. Beckwith*, 128 N. Y. 312; *Kent v. West*, 33 App. Div. 112.)

McLAUGHLIN, J. The committee of the property of Samuel E. Haslett, an incompetent person, appeals to this court from an order of the Appellate Division, second department, reversing an order of the County Court of Kings county, which dismissed the petition of the respondent for the payment of a claim against the estate of Samuel E. Haslett, and sending the matter back to the County Court for further consideration. The Appellate Division certified the following question: "Does the petition herein state facts sufficient to justify the court in granting to the petitioner equitable relief as prayed for herein?"

The question presented, therefore, is whether, upon the facts set out in the petition, the County Court should have directed the payment of the claim, either in whole or in part.

The petition alleges, in substance, that on the 18th of March, 1912, Samuel E. Haslett was adjudged an incompetent person and the appellants appointed a committee of his property; that for many years prior to his being adjudged an incompetent, the petitioner had acted as his legal adviser and assisted him in that connection in many ways; that in the latter part of April, 1911, Haslett's mind became impaired to such an extent that in the early part of 1912 the petitioner took charge of his residence, looked after his comfort, etc.; that on

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the 15th of February, 1912, the petitioner was informed that Haslett had delivered to one Gardner a power of attorney to act for him with reference to his property; that upon acquiring this information the petitioner went to the residence of Haslett, found him confined to his bed in the care of a nurse named Decker, from whom he learned that Haslett had, in fact, given such power of attorney; that Gardner, acting under the same, had taken charge of Haslett's residence, and between the 15th and 18th of February refused to admit the petitioner and other persons having business relations with him; that by reason of the facts stated, the petitioner feared Decker and Gardner were engaged in a conspiracy to obtain control of the person and property of Haslett; that thereupon he consulted with a magistrate and laid the facts before him, with the result that the magistrate issued a summons to one Samuels, a relative of said Haslett upon the return of which a preliminary investigation was conducted, where it appeared that a power of attorney dated February 15, 1912, purporting to be executed by Haslett, and giving to Gardner full power and authority over the person and property of said Haslett, was produced; that the petitioner examined the same and reached the conclusion that the signature thereon was not genuine; that the magistrate, at the conclusion of the hearing, issued a warrant for the arrest of Decker and Gardner upon the charge of conspiracy; that they were arrested, subsequently indicted, placed upon trial, and in 1916 acquitted; that following their acquittal each commenced an action against the petitioner to recover damages for malicious prosecution; that the petitioner appeared in each action by attorneys retained by him and interposed answers; that about the time the cases were ready for trial the petitioner, acting under the advice of his attorneys, retained trial counsel, who advised him to settle and compromise the actions, which he did by paying to each plaintiff \$1,000; that his expenses in

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defending the actions, including the amounts paid to the plaintiffs, amounted to \$7,788.39, and he asked that an order be made directing the committee to pay this amount out of Haslett's estate.

I am of the opinion that the County Court was right in dismissing the petition. The County Court held there was no authority in law to justify the payment of the claim or any part of it, and with this view I fully agree. The petitioner, a third party, acting upon his own initiative, took steps which resulted in the arrest, subsequent indictment and trial of Decker and Gardner. His acts were unjustified, and had the incompetent been restored to health he would have been under neither a legal nor moral obligation to pay the claim. The committee stands in precisely the same position. It was not made a party to the proceeding, nor was it consulted, so far as appears, as to the settlement and compromise.

Attention is called by the respondent to *Matter of Heeney* (2 Barb. Ch. 326) as justifying the payment of this claim. It falls far short of it. There, the incompetent, when in full possession of his faculties, adopted two young women. He had likewise paid his sister an annuity and had supported three old women by fixed allowances. These facts the chancellor held satisfied him beyond all reasonable doubt that the lunatic, if in good health, would have continued such support.

Matter of Willoughby (11 Paige, 257), cited by the respondent, is not in point. There, the application for an allowance for a stepdaughter of the lunatic was denied because the chancellor was not satisfied that the lunatic would, if restored to his reason, consider her as having a claim upon his bounty. The denial was also placed upon the grounds that the opposing affidavit showed that the lunatic did not consider her as an adopted daughter and because she had property of her own.

All of the authorities, so far as I am aware, where

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allowances of this character have been made, are upon the theory that the lunatic would, in all probability, have made such payments if he had been of sound mind (*Matter of Heeney, supra*; *Matter of Farmers' L. & T. Co.*, 181 App. Div. 642; affd., 225 N. Y. 666; *Matter of Earl of Carysfort*, 1840, Craig & P. 76) or where proceedings have been instituted to have it adjudged that the lunatic has been restored to health and to have the committee discharged. (*Carter v. Beckwith*, 128 N. Y. 312; *Matter of Larner*, 68 App. Div. 320.)

In the instant case there is not a single fact set forth which would justify the court in reaching the conclusion that if the incompetent were restored to health he would pay the claim or any part of it. In this connection it is to be noted there is nothing in the petition to indicate the size of the incompetent's estate, or that if the payment were made it would not entirely exhaust it. I lay little stress upon this, however, because the view which I take of the application is that if the incompetent were restored to health, there would be, upon the facts presented, certainly no legal, nor do I think any moral, obligation on his part to indemnify the petitioner for the expenses incurred by him in defending the actions referred to.

The order appealed from should, therefore, be reversed and the order of the County Court affirmed, with costs in this court and the Appellate Division. The question certified should be answered in the negative.

HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, POUND and ANDREWS, JJ., concur.

Order reversed, etc.

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In the Matter of the Application of CHARLES H. SEMPER, Respondent, for a Writ of Mandamus, against EDWIN DUFFEY, as State Commissioner of Highways, Appellant.

**State highways—contract for construction of highway—
forfeiture of deposit made by bidder—mandamus—when
such bidder cannot recover deposit because of error in esti-
mates of state.**

A contractor in a proposal for the construction of a state highway stated that his information of the work to be done and materials to be furnished was "secured by personal investigation and research and not from the estimates of the State Commissioner of Highways." He in fact made his bid based upon such estimates, and, after the bid was accepted, refused to execute the contract upon the ground that his proposal was due to a misunderstanding on his part or a mutual mistake in that the statement in the estimates that certain materials could be obtained at a near-by place at a designated price, was erroneous. Under these circumstances it is not the clear legal duty of the state to relieve the contractor from his obligation and he cannot recover, by mandamus, the certified check which he deposited with the state to become its property if his proposal was accepted and he failed to execute the contract. (*Faber v. City of New York*, 222 N. Y. 255, 260, distinguished.)

Matter of Semper v. Duffey, 188 App. Div. 984, reversed.

(Argued September 3, 1919; decided October 14, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered July 8, 1919, which affirmed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the state superintendent of highways to return a check deposited as security on a road contract.

The facts, so far as material, are stated in the opinion.

Charles D. Newton, Attorney-General (Arthur E. Rose and B. F. Sturgis of counsel), for appellant. The estimate

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sheet was no part of the plans or specifications, or of the contract, and the statements contained therein were not warranties or representations intended to be relied upon (*W.-Q. Asphalt Co. v. Carlisle*, 158 App. Div. 638; *Simpson & Co. v. U. S.*, 31 U. S. Court of Claims, 217; affd., 172 U. S. 372; *Callahan Construction Company v. U. S.*, 47 U. S. Court of Claims, 177; *Lewman v. U. S.*, 31 U. S. Court of Claims, 470.) Not only does the proposal contract executed by the respondent bar him from asserting that he is deceived by the statements in the estimate sheet but the evidence discloses the fact that he did not actually rely on such statements. (*Southern Development Co. v. Silva*, 125 U. S. 247; *Farrar v. Churchill*, 135 U. S. 609.)

John N. Carlisle for respondent. The state having made on its estimate sheet a positive statement that stone could be procured from a commercial quarry at Union Springs, it cannot now repudiate this positive statement and rely upon any qualifying clauses in either the proposal, information for bidders or in the proposed contract to overturn such statement so made and relied upon. (*Hollerbach v. United States*, 233 U. S. 165.) There being in this case a mutual mistake of fact and the relator having been led by the statement of the state to make his bid, he is entitled to a return of his check. (*Atlantic Construction Co. v. State*, 103 Misc. Rep. 234; *Faber v. City of New York*, 222 N. Y. 255; *Harper, Inc., v. City of Newburgh*, 159 App. Div. 695; *Christie v. United States*, 237 U. S. 233; *Hollerbach v. United States*, 233 U. S. 165; *Leary v. Geller*, 224 N. Y. 56; *Martens v. City of Syracuse*, 183 App. Div. 622; *Lumber Ex. Bank v. Miller*, 18 Misc. Rep. 127.)

POUND, J. Relator was a bidder for the construction of a state highway. The estimate sheet exhibited by the state commissioner of highways to contractors

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indicated in entire good faith that the supply of stone necessary therefor could be obtained at Union Springs at ninety cents the cubic yard. That was a mistake, as relator discovered after making his bid. It could only be obtained elsewhere at a much higher cost. He refused to execute the contract and now seeks to recover a certified check for \$1,450 which he deposited with his proposal, to become the property of the state if his proposal was accepted and he failed to execute the contract. It has been held below that his proposal was due to a misunderstanding on his part or a mutual mistake of fact as to the possibility of obtaining the stone at Union Springs according to the estimate and that it was the clear legal duty of defendant to return the check.

I reach the conclusion that no mistake or misunderstanding as to the place where the relator could obtain stone will avail him in this proceeding. His itemized proposal states that he has carefully examined among other things "the form of contract," and that the certified check accompanying the bid "shall become the property of the state if his proposal is accepted and he fails to execute the contract." He thus binds himself to enter into a contract in and by which he agrees that his information "regarding all the conditions affecting the work to be done and labor and materials to be furnished for the completion of this contract * * * was secured by personal investigation and research and not from the estimates of the State Commissioner of Highways; and that he will make no claim against the state by reason of estimates, tests or representations of any officer or agent of the state." It thus appears that the proposal was so related to the contract that the contractor was precluded from relying on the statement in the estimate that stone would be obtained at a given place at a given price. The statement was suggestive merely, directing him for inquiries to what the state considered the nearest available source of supply. The bidder had the same

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opportunity to discover the facts that the state had and he in his proposal agreed to execute a contract to the effect that he had availed himself of his opportunity and was content to make the proposal and to execute the contract upon the understanding that he was relying on his own personal investigation.

We held in *Faber v. City of New York* (222 N. Y. 255, 260) that where the contractor had no reasonable opportunity to discover the truth as to the position of bed rock and the evidence was sufficient to show that the contract was made by both parties on the understanding that the bed rock was as indicated in the plan prepared by the city, the contractor might recover for extra work, but here the parties had entire equality of opportunity. The case is the same as any mutual misunderstanding as to price, source of supply, and the like. The proposal is made at the bidder's risk in these regards, certainly where no element of deception or inequality or inequity is presented. The bidder has forfeited the money accompanying his bid by failing to execute the contract. The result may seem harsh but the state properly protects itself by the strictness of its contract and the relator must be bound by the terms thereof as proffered.

The orders of the Special Term and the Appellate Division should be reversed and the application for the writ of mandamus denied, with costs to appellant in all courts.

HISCOCK, Ch. J., CHASE, CARDZOZO and ANDREWS, JJ., concur; HOGAN, J., absent; McLAUGHLIN, J., not voting.

Orders reversed, etc.

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WILLIAM B. FARNHAM et al., Appellants, v. CORA M. FARNHAM, Respondent.

Husband and wife — alimony — action by persons, claiming to be entitled to property of a husband now deceased, to annul his marriage to the defendant on ground that he was a lunatic and incapable of entering into a marriage contract — plaintiffs in such action not required to pay alimony and counsel fee to defendant.

This action is brought under section 1747 of the Code of Civil Procedure for the purpose of procuring a judgment annulling the marriage of the defendant, whose husband is now deceased, on the ground that at the time the ceremony was performed the latter was incapable of entering into the contract by reason of his then being a lunatic. The plaintiffs are entitled to share in the estate of the father of the deceased husband, in which estate a child of his marriage to defendant is entitled to a distributive share in case the marriage was valid. *Held*, that while the statute clothes them with authority, as interested parties, to maintain an action to test the validity of the marriage, they are under no obligation to pay alimony or to furnish defendant with means to defend the action. She is not a privileged suitor against them, but only against her husband while he lived.

Farnham v. Farnham, 186 App. Div. 937, reversed.

(Submitted September 30, 1919; decided October 21, 1919.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 9, 1918, which affirmed an order of Special Term granting a motion for alimony and counsel fee in an action to annul a marriage.

The following question was certified: "Had the court power to make the order appealed from?"

The facts, so far as material, are stated in the opinion.

F. E. Converse for appellants. The court was without power to make the order appealed from, for the reason that the plaintiffs do not stand in the relation of husband

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to the defendant. (Edol. Abr. 508 [cited in 1 Bishop on Mar. & Div. § 1386, n. I]; Stewart on Mar. & Div. [1887 ed.] § 358; *Cooke v. Cooke*, 2 Phill. 40; Shelford on Mar. & Div. 586; *Rogers v. Vines*, 6 Ire. 293; *Burr v. Burr*, 7 Hill, 207; 2 Bishop on Mar. & Div. §§ 829, 887. Story's Eq. Juris. § 1424; *Morrell v. Morrell*, 2 Barb. 480; *Griffin v. Griffin*, 47 N. Y. 134; *Wood v. Wood*, 2 Paige, 108; *Collins v. Collins*, 71 N. Y. 269; *Lake v. Lake*, 194 N. Y. 179.) The statute (Code Civ. Pro. § 1769) limits the power of the court to an order requiring the husband, only, to pay alimony and counsel fees. (*Erkenbrach v. Erkenbrach*, 96 N. Y. 456; *Livingston v. Livingston*, 173 N. Y. 377; *Walker v. Walker*, 155 N. Y. 77; *Walter v. Walter*, 217 N. Y. 439; *Johnson v. Johnson*, 206 N. Y. 561; *Ramsden v. Ramsden*, 91 N. Y. 281.) The grant of jurisdiction to entertain an action to annul a marriage carries with it no implied or incidental power to award alimony to be paid by any litigant other than a husband. (*Ball v. Montgomery*, 2 Ves. Jr. 190; *Cooke v. Cooke*, I Eng. Ecc. 178; *Atwater v. Atwater*, 53 Barb. 621; *Rockwell v. Morgan*, 13 N. J. Eq. 119.) The court was further without power to grant the order appealed from, for the reason that the trustee who was directed to pay the allotted sum from funds in his hands is not a party to the action. Neither had the court jurisdiction over the fund. (*Goodsell v. Western Union Tel. Co.*, 109 N. Y. 147; *Story v. N. Y. & H. Railroad*, 6 N. Y. 85; *South Buffalo Ry. Co. v. Kirkover*, 176 N. Y. 301; *Altman v. Hofeller*, 152 N. Y. 498; *Bamberg v. International Ry. Co.*, 121 App. Div. 4; *Boice v. Jones*, 106 App. Div. 548; Code Civ. Pro. § 416; *Knickerbocker Trust Co. v. O., C. & R. S. Ry. Co.*, 201 N. Y. 379.)

E. W. Hamn and *Elmer E. Stanton* for respondent. The court had the power to allow the wife alimony and counsel fees in its discretion. (*Higgins v. Sharp*, 164 N. Y. 4; *Brinkley v. Brinkley*, 50 N. Y. 184; *Griffin v.*

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Griffin, 47 N. Y. 134; *Jones v. Brinsmade*, 183 N. Y. 259.)

McLAUGHLIN, J. In 1905 William H. Farnham died, at Palmyra, N. Y., leaving him surviving as his only heir-at-law and next of kin, his son, Louis S. Farnham. He left a will, which was admitted to probate, in which he gave and devised all his estate, real and personal, in trust to John K. Williamson, to use the income therefrom for the support of his widow and son during their joint lives and the life of the survivor, and upon the death of the survivor to pay and distribute what remained to and among his heirs-at-law and next of kin in the manner and proportions prescribed by law in case of intestacy. The wife of the testator predeceased him. In 1910 the son married the defendant at Kansas City, Kansas. He died June 5, 1917, leaving him surviving the defendant, his alleged widow, and William H. Farnham, 2d, the only issue of the marriage. The plaintiff Elizabeth Cranmer is a sister of the testator and the other plaintiffs are his nephews. The action is brought under section 1747 of the Code of Civil Procedure for the purpose of procuring a judgment annulling the marriage of the defendant to Louis S. Farnham, on the ground that at the time the ceremony was performed the latter was incapable of entering into the contract by reason of his then being a lunatic. After issue had been joined, the defendant moved for alimony and counsel fee. The motion resulted in an order allowing defendant \$100 per month alimony during the pendency of the action and \$750 counsel fee, such sums to be paid from the funds in the hands of the trustee under the will of William H. Farnham. An appeal was taken to the Appellate Division, fourth department, which affirmed the order, but granted permission to appeal to this court, certifying the following question: "Had the court power to make the order appealed from?"

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I am of the opinion the orders appealed from should be reversed and the motion for alimony and counsel fee denied. There is no authority, so far as I am aware, justifying the making of such allowance, nor do I believe the court had power to make it. Alimony and counsel fee can only be allowed when the relation of husband and wife exists. The defendant has no husband. He died in June, 1917, and after his death the court had no power to make an order allowing alimony and counsel fee in an action brought to annul the marriage. If the marriage were a valid one, then the statute defines what interest the widow takes in the husband's estate, and that interest is substituted for and takes the place of the obligation resting upon him, prior to his death, to support her. The obligation to support and maintain is the underlying principle which justifies the granting of alimony and counsel fee, when the marriage relation is attacked. The plaintiffs, however, stand in no such position to the defendant. They are strangers to her. The statute clothes them with authority, as interested parties, to maintain an action to test the validity of the marriage, and they are under no more obligation to furnish her with means to defend the action than they are to support her. She is not a privileged suitor against them, but only against her husband while he lived.

There are several other ways in which the validity of a marriage may be attacked, *e. g.*, action to admeasure dower; to partition real property; to distribute or administer the personal estate. It has never been held, so far as I am aware, after a diligent search, that when thus attacked, alimony and counsel fee can be given out of the property involved. This court has frequently applied this rule and held that it is only where the parties to the action stand in the relation of husband and wife that the latter is entitled to alimony and counsel fee.

In *Collins v. Collins* (71 N. Y. 269) the court held that in order to authorize such allowance it must be admitted,

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or proof presented sufficient to authorize the court to determine, that the applicant "stands in the relation of wife to the party against whom the application is made."

And in *Lake v. Lake* (194 N. Y. 179) it was held that such an order must primarily rest upon the existence of the relation of husband and wife; "unless that relation is sustained by the parties there is no basis for the order."

But it is suggested, not by counsel, that this is an action to annul a marriage and, therefore, a different rule applies; that independent of the statute there is inherent power in the court to make the allowance. Undoubtedly, where the husband attacks the validity of the marriage, and seeks to have it annulled, there is implied power in the court to award the wife, during the pendency of the action, sufficient funds from his estate to pay her living expenses and also counsel fee to enable her to defend the action. (*Higgins v. Sharp*, 164 N. Y. 4; *Griffin v. Griffin*, 47 N. Y. 134; *North v. North*, 1 Barb. Ch. 241.) But where the wife brings an action to have the marriage annulled, it has been held that the court has no power to award alimony and counsel fee. (*Jones v. Brinsmade*, 183 N. Y. 258.) The principle underlying that decision is that if the wife succeed, the decree nullifying the marriage relates back to the contract of marriage and the parties in that event are in the same position as if they never had been married; in other words, that the wife having elected to rescind the contract, can claim nothing under it.

What was said in *Rockwell v. Morgan* (13 N. J. Eq. 119) is quite applicable here. That action was brought to admeasure dower and it was sought to have an allowance made out of the property involved. The learned chancellor said: "I have been unable to discover any principle upon which the relief asked for can be granted, nor have I found any case which supports the application. It is simply a request for maintenance out of the property in question during the progress of the controversy. * * *

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In a controversy with her husband it is just that she should have the means of enforcing her claim, or of testing its validity. But the doweress is not under coverture. The claim is not against her husband, nor even against his estate. * * * But what stronger claim has she in equity against her husband's children than she would have against a stranger? She clearly has no claim in this court to alimony or maintenance from the children. I know of no case in which this claim is allowed, except as against the husband himself, and that only as incidental to a bill for divorce or other relief against the husband * * *."

The action, as indicated, is to annul a marriage. The wife is defendant, but the adverse party is not her husband and the estate out of which she asks for the allowance is not that of her husband. The property never belonged to him. His only interest therein was the right to the income therefrom. The title is in the trustee appointed by the will of William H. Farnham. If the plaintiffs succeed in the action the property will belong to them, and if they fail then the property will belong to the infant son of her deceased husband. Upon what possible theory can the property of a third party be summarily taken from him and given to another? Is the title to property so insecurely protected? I do not think so.

There is another reason why this order is erroneous though I prefer to place my decision upon the ground already stated. The property from which the allowance is directed to be paid is in the hands of a trustee, who is not a party to the action. The court has no jurisdiction over him, nor has it any jurisdiction over the fund which he holds. Before the same, or any part of it, can be taken from him he is entitled to his day in court.

The orders of the Appellate Division and the Special Term should, therefore, be reversed and the motion for alimony and counsel fee denied, without costs. The question certified is answered in the negative.

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Dissenting opinion, per POUND, J.

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POUND, J. (dissenting). I am unable to concur in the opinion of the court herein.

The wife in a matrimonial action, brought after the death of the husband by his relatives who have an interest to avoid the marriage, asks the court for an allowance for counsel fee and alimony. The relation of husband and wife existed when the husband died. On general principles of equity, the court should have power to require those who seek to annul a marriage for their pecuniary gain to pay such sums as may be necessary to enable the wife to conduct her defense. Counsel fee and alimony are incidents peculiar to the trial of matrimonial actions. (*Lake v. Lake*, 194 N. Y. 179.) No express statutory authority being given, the power of the court to make such an allowance is sustained as incidental to annulment actions where the husband brings the action and the wife seeks to sustain the validity of the marriage. (*Jones v. Brinsmade*, 183 N. Y. 258.) The relation of husband and wife has been terminated, but not dissolved. The husband did not question it. The fact that he is dead does not make the claim for counsel fee inequitable. Why equity should refuse to lay hold of the very fund that the plaintiffs seek to obtain as the result of their attack on the marriage in order to make the allowance therefrom is not apparent. Defendant seeks to protect, not property rights merely, but her status as a lawful wife and the legitimacy of the child and the child's inheritance. (Code Civ. Pro. § 1749, as amended by L. 1919, ch. 202.) Plaintiffs attack such status and such legitimacy to possess themselves of the fund. It seems unjust and inconsistent on these facts to compel the wife to conduct her defense at her own expense. If plaintiffs succeed, the fund will be diminished only to the extent necessary to protect her from oppression and to enable her to present her defense.

But she has no reason for demanding support from the

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fund or from the plaintiffs. If the action had not been brought, she would have no claim on plaintiffs or the fund for such support and the action creates no equities in that regard.

I am for a decision modifying the order appealed from by striking therefrom the provision for alimony *pendente lite*, and otherwise affirming it, without costs.

HISCOCK, Ch. J., HOGAN, CARDOZO and ANDREWS, JJ., concur with McLAUGHLIN, J.; POUND, J., reads dissenting opinion, with whom CHASE, J., concurs.

Orders reversed, etc.

ROBERT GRAFTON, Appellant, *v.* UNITED STATES FIDELITY AND GUARANTY COMPANY, Respondent.

Trial — when new trial was granted on conditions but was not had because plaintiff appealed from the order which was reversed and judgment reinstated, the surety on undertaking for new trial need not pay reinstated judgment upon defendant's failure to pay the same.

The court granted a motion to set aside a verdict upon the condition among others that defendant file an undertaking conditioned for the payment of any judgment which may be recovered by the plaintiff against him with which condition defendant complied. Plaintiff appealed from the order which was reversed and the verdict of the jury reinstated, whereupon judgment was entered thereon. In this action to recover on the undertaking, *held*, that the purpose of the undertaking was to obtain a new trial, and its condition should be construed and enforced with reference to that purpose, and so construed it covenanted only to pay any judgment resulting from or arising by reason of a new trial. Hence, the complaint was properly dismissed.

Grafton v. U. S. Fidelity & Guaranty Co., 175 App. Div. 950, affirmed.

(Argued October 10, 1919; decided October 21, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department,

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entered December 6, 1916, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term without a jury.

The nature of the action and the facts, so far as material, are stated in the opinion.

Vine H. Smith and *John B. Johnston* for appellant. The defendant, by its undertaking, in plain terms and in accord with the manifest scope of the court's order, has guaranteed payment of the judgment against Ball recovered by plaintiff in the action in which defendant's undertaking was filed. (*Caponigri v. Cooper*, 70 App. Div. 124; *Doon v. Amer. Surety Co.*, 110 App. Div. 215; 186 N. Y. 598; *Scott v. Duncombe*, 49 Barb. 73; *Sonneborn v. Libbey*, 102 N. Y. 539; *Peschmanns v. Nat. Surety Co.*, 93 Misc. Rep. 321; 172 App. Div. 955; *Ulster Sav. Inst. v. Young*, 161 N. Y. 23; *Utica, etc., Bank v. Grim*, 222 N. Y. 207; *United Surety Co. v. Meenan*, 211 N. Y. 39.) There is no basis for the contention that there is a lack or a failure of consideration for defendant's undertaking. The plaintiff suffered, and defendant's principal procured, a stay of plaintiff's right to enter judgment for seven months, and this stay, upon elementary principles and under controlling decisions, constitutes ample consideration for the undertaking. (*Street v. Galt*, 136 App. Div. 724; 202 N. Y. 575; *Wing v. Rogers*, 138 N. Y. 361; *Goodwin v. Bunzl*, 102 N. Y. 224; *Decker v. Judson*, 16 N. Y. 349; *City of Mt. Vernon v. Brett*, 193 N. Y. 276.) The defendant is not exonerated from the obligation expressed in its bond by reason of the fact that the provision for a new trial in the order pursuant to which that bond was filed was eventually reversed. The bond was required as a condition of the court's order setting the verdict aside and thereby subjecting the plaintiff to delay. Protection against such delay was not made contingent upon plaintiff's acceptance of the direction for a new trial or his waiver

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of his right to attack that direction on appeal. The delay is not less real or outside the scope of defendant's undertaking because of the adjudication that it was wrongly imposed upon plaintiff. (*Ettlinger v. Nat. Surety Co.*, 221 N. Y. 468; *Severson v. Macomber*, 212 N. Y. 282; *People ex rel. R. & J. Co. v. Lazansky*, 208 N. Y. 435; *Clancy v. R. R. Co.*, 226 N. Y. 213.)

William J. McArthur and *Leonidas Dennis* for respondent. The undertaking failed to accomplish the purpose for which it was given; the consideration for which the bond was given entirely failed and the bond is, therefore, unenforceable. (*Wing v. Rogers*, 138 N. Y. 361; *Hemingway v. Poucher*, 98 N. Y. 281; *Carter v. Hodge*, 150 N. Y. 532; *People v. Backus*, 117 N. Y. 196; *Manning v. Gould*, 90 N. Y. 476.)

CHASE, J. Grafton, the plaintiff in this action, prior to February 23, 1914, brought an action against one Ball on contract. The issues joined in that action came on for trial in Kings county on that day, and the jury rendered a verdict in favor of Grafton for \$7,000. A motion was then made by Ball to set aside the verdict and for a new trial upon all the grounds stated in section 999 of the Code of Civil Procedure, and the court entertained the motion. While the motion was pending Ball made a further motion to set aside the verdict on the ground of newly-discovered evidence.

On March 14, 1914, the court made an order denying the motion on the grounds stated in said section of the Code, but granted the motion to set aside the verdict upon the ground of newly-discovered evidence, upon condition (1) that within five days Ball pay the plaintiff's taxable costs and disbursements including trial fee. (2) That within five days he file an undertaking with sufficient surety in the penal sum of \$14,000, "conditioned for the payment of any judgment which may

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be recovered by the plaintiff against him." (3) That he shall stipulate that the case be set for retrial on the fourth Monday of March, 1914, and that he shall be ready for trial on that day. (4) That if the conditions are not complied with the motion to set aside the verdict upon the ground of newly-discovered evidence be denied. The court further ordered that the clerk of the court set the case for trial at the head of the day calendar for the fourth Monday of March, 1914, providing Ball complied with the conditions in said order imposed.

Ball complied with the conditions of the order, and in pursuance thereof on March 19th the defendant in this action executed on behalf of said Ball an undertaking conditioned "That the defendant, John Oscar Ball, will pay any judgment that may be recovered by the plaintiff against said defendant in this action."

The fourth Monday in March, 1914, was the twenty-third of that month. Instead of proceeding to a retrial the plaintiff, on Saturday, March 21st, immediately preceding the fourth Monday on which the order provided that the trial should take place, appealed to the Appellate Division from said order dated March 14th, 1914, so far as it granted a new trial. The Appellate Division on October 16th, 1914, reversed the order so far as appealed from and reinstated the verdict of the jury. On October 21st, 1914, the plaintiff entered judgment on the verdict so reinstated against Ball for \$7,610.78. Execution was duly issued on said judgment and returned wholly unsatisfied. This action was then brought upon said undertaking. The facts substantially as hereinbefore stated were alleged in the defendant's answer and it denied liability.

The only question involved on this appeal is whether the defendant by its undertaking contracted to pay any judgment against the said Ball other than one obtained as the result of a new trial. The liability of the defendant must be determined, having in mind the purpose

for which the undertaking was given. It was not given to stay the entry of judgment upon the verdict. It was given for the purpose of setting aside the verdict and as a condition of obtaining a new trial. It was to obtain an order by which the verdict was to be unqualifiedly and absolutely held for naught. Upon the entry of the order and compliance therewith and so long as it remained in force no judgment in the action could ever be had against Ball until a retrial thereof and a determination of the issues in favor of the plaintiff. The possible reversal of the order does not seem to have been considered by the parties. The reversal of the order of March 14th enabled the plaintiff to enter judgment upon the verdict which from the entry of said order of March 14th and compliance therewith had been non-existent.

The fact that the time during which the verdict was non-existent was lost to the plaintiff, as if he had been stayed during that time from entering judgment, does not show that the undertaking was given to accomplish a stay. We should look at the undertaking and the recitals therein and the legal proceedings out of which it grew in order to determine its real consideration and conditions. (*Wing v. Rogers*, 138 N. Y. 361.) The purpose of the undertaking was to obtain a new trial, and its condition should be construed and enforced with reference to that purpose, and so construed it covenanted to pay any judgment in the action against Ball resulting from or arising by reason of the new trial. We do not mean to say that the order could not have been made upon condition that the defendant give an undertaking providing for the payment of any judgment that should be entered against Ball in the action upon a new trial, and also any judgment that should be entered on the verdict which was by the order set aside in case such order setting aside the verdict was thereafter reversed. We hold that it was not the purpose of the parties in giving and accepting the undertaking to include in the

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condition thereof the payment of a judgment entered upon the verdict after the reversal of the order appealed from.

The judgment should be affirmed, with costs.

HISCOCK, Ch. J., COLLIN, HOGAN, POUND, McLAUGHLIN and CRANE, JJ., concur.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. CHARLES BAST, Appellant, *v.* JOHN R. VOORHIS et al., Constituting the Board of Elections of the City of New York, Respondents, Impleaded with Others.

(Queens county — sheriffs — elections — the present sheriff of Queens county having been elected for a term to expire January 23, 1920, there will be no vacancy in the office to be filled at the general election in November, 1919.

The sheriff of Queens county was elected at a special election for the term of three years to expire on January 23, 1920; hence there will be no vacancy in that office until that date. When the vacancy occurs the governor may appoint an incumbent to hold office until a sheriff to be elected at the general election in November, 1920, takes the office on January 1, 1921. Therefore, the electors of Queens county cannot lawfully choose a sheriff at the general election in 1919.

People ex rel. Bast v. Voorhis, 189 App. Div. 909, reversed.

(Argued October 16, 1919; decided October 21, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered October 3, 1919, which reversed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the board of elections of the city of New York in making and preparing notices, ballots, etc., to be used at the general election to be held in the county of Queens on November 4, 1919, to disregard the names of candidates for the office of sheriff,

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and directing that the names of none of said candidates should appear thereon.

The facts, so far as material, are stated in the opinion.

George H. Alexander for appellant. There will be no vacancy "occurring before October fifteenth" of the year 1919 in the office of sheriff of Queens county. (*Matter of Mitchell v. Prendergast*, 222 N. Y. 543; 178 App. Div. 690; *Matter of Lempp v. Voorhis*, 224 N. Y. 633; 185 App. Div. 939; *People ex rel. Gallup v. Green*, 2 Wend. 266; *Coutant v. People*, 11 Wend. 511.) There will be no vacancy in the office of sheriff of Queens county on the 1st day of January, 1920. (*Matter of Mitchell v. Prendergast*, 222 N. Y. 543; *Lempp v. Voorhis*, 224 N. Y. 633; *People ex rel. Gallup v. Green*, 2 Wend. 266.) There being no vacancy in the office, either on January 1, 1920, or "occurring before October fifteenth," 1919, there is no legal warrant for holding an election for said office at the November general election. (*Matter of Mitchell v. Boyle*, 219 N. Y. 242; Election Law [Cons. Laws, ch. 17], § 292.)

Egar Weaver and *Charles W. Froessel* for Samuel J. Mitchell, as sheriff of Queens county. The term of office of the present sheriff is three full years, and does not expire before January 23, 1920. (N. Y. Const. art. 10, § 1; County Law, § 180; *Coutant v. People*, 11 Wend. 511; Cooley's Const. Lim. [7th ed.] 102; *People ex rel. Snyder v. Hylan*, 212 N. Y. 236; *People v. Snedeker*, 14 N. Y. 52.) A successor to the present sheriff cannot be elected at the 1919 general election, as said office is already lawfully filled to a time beyond January 1, 1920. (Cons. Laws, ch. 11, § 246; Cons. Laws, ch. 17, § 3, subd. 1.) There is ample provision in the law to provide for a successor to the present sheriff. (Cons. Laws, ch. 11, §§ 180, 181.)

William P. Burr, Corporation Counsel (*William E. C. Mayer*, *George P. Nicholson*, *John F. O'Brien* and *Russell L. Tarbox* of counsel), for board of elections of city of

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New York, respondent. The command of the Constitution is that a sheriff in Queens county "shall be chosen by the electors * * * once in every three years, and as often as vacancies shall happen." Hence, it is a mandatory requirement that, as soon as may be before the expiration of the term of the office, the successor of an outgoing sheriff shall be chosen by the electors; and a convenient general election is the proper time, prescribed by law, at which to choose such successor. (Const. art. 10, §§ 1, 4; County Law, § 246; Election Law, §§ 3, subd. 1, 290, 293; *Matter of Mitchell v. Boyle*, 219 N. Y. 242, 248; *Matter of Mitchell v. Prendergast*, 178 App. Div. 690; 222 N. Y. 543; *Matter of O'Brien v. Boyle*, 219 N. Y. 195; *People ex rel. Stupp v. Kent*, 83 App. Div. 554.)

Richard S. Newcombe and *Elmer E. Wigg* for William N. George, respondent. There will be no vacancy. (*People v. Gardner*, 45 N. Y. 812; *Dizur v. Provost*, 99 App. Div. 14.) If it be held that Sheriff Mitchell's term does not expire before January 23, 1920, the office must remain vacant for no special election can be held, the governor cannot appoint nor can the under-sheriff hold over. (Cons. Laws, ch. 11, § 180; Cons. Laws, ch. 17, § 292; Cons. Laws, ch. 47, § 38; Const. of N. Y. art. 10, § 5.) The uniformity of elections sought by the Constitution and legislative enactments must be upheld by the courts. (*Durousseau v. United States*, 6 Cranch, 314; *People ex rel. Jackson v. Potter*, 47 N. Y. 382.)

CHASE, J. The question presented on this appeal is whether the electors of the county of Queens can lawfully choose a sheriff for that county at the general election to be held November 4 of this year. The Constitution provides that the time of electing all officers named in article 10 thereof shall be prescribed by law. (Const. art. 10, sec. 4.) Sheriffs are named in that article. The political year begins on the first day of January. (Const. art. 10, sec. 6.) The legislature has prescribed for the

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election of sheriffs to hold office "for three years from and including the first day of January succeeding their election." (County Law [Cons. Laws, ch. 11], sec. 180.) The legislature has also provided that "The term of office of an elective officer, unless elected to fill a vacancy then existing, shall commence on the first day of January next after his election, if the commencement thereof be not otherwise fixed by law." (Public Officers Law [Cons. Laws, ch. 47], sec. 4.) The electors of the county of Queens cannot, therefore, lawfully choose a sheriff at the general election of this year if the person now occupying that office will continue in office by virtue of his election on and after the first day of January, 1920.

The facts out of which this controversy arises have been frequently stated in the decision of other controversies arising therefrom. So far as material in this proceeding the facts are that a sheriff was duly elected in the county of Queens at the general election held in 1915. He duly qualified and entered upon the discharge of his duties at the beginning of the year 1916 for a term of three years which would expire at the end of December, 1918. On October 23, 1916, he died. An effort was made by certain persons in that county to file certificates of nomination of persons as candidates for sheriff to be chosen at the general election of 1916. The board of elections of the city of New York refused to file such certificates of nomination and an application was made to the court for a peremptory writ of mandamus to compel such board to receive and file such certificates. The application was granted and the order granting the same was on appeal affirmed by the Appellate Division (*Matter of Mitchell v. Boyle*, 175 App. Div. 905), but on appeal to this court the orders were reversed and the application denied. (*Matter of Mitchell v. Boyle*, 219 N. Y. 242.) This court held that the vacancy existing in the office of sheriff could not be filled at the general election of 1916 because the death of the sheriff which created the vacancy

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occurred after October 15, 1916. (Election Law [Cons. Laws, ch. 17], sec. 292.) The governor thereafter called a special election in the county of Queens to choose a sheriff, and that election was held on the 23d day of January, 1917. Before the special election was held an application was made to the court for a writ of mandamus directing the board of elections to cease and refrain from taking any proceedings to hold such special election. That application was denied (*People ex rel. Conklin v. Boyle*, 98 Misc. Rep. 364), and the order entered thereon was on appeal affirmed by the Appellate Division. (*People ex rel. Conklin v. Boyle*, 178 App. Div. 908.) After January 23, 1917, a controversy arose as to when the person elected at such special election took office. In that controversy it was held that the person so elected on that day took office as of the day of his election. (*Matter of Mitchell v. Prendergast*, 222 N. Y. 543, affirming S. C., 178 App. Div. 690.)

Prior to the general election in 1918 certificates of nomination of persons as candidates for sheriff, to be chosen at the general election of that year, were filed with the board of elections. An application was then made to the court for a writ of mandamus to prevent the board of elections from printing the names of candidates for sheriff on the ballots to be used in that county at the general election. The Special Term held that the term of office of the incumbent of the office of sheriff was for three years, and that his term commenced on January 23, 1917, and that it would not expire until January 23, 1920, and denied the petition. (*People ex rel. Lempp v. Board of Elections*, N. Y. Law Journal, Sept. 30, 1918.) The order entered thereon was on appeal affirmed by the Appellate Division (*People ex rel. Lempp v. Board of Elections*, 185 App. Div. 939), and the order of the Appellate Division was on appeal therefrom affirmed in this court. (*People ex rel. Lempp v. Board of Elections*, 224 N. Y. 633.)

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The decision of this court was without opinion, but it was necessarily and in fact made because the court held that the election of January 23, 1917, was not for the unexpired term of the sheriff who died while in office, but for a full term of three years from the day of the election.

The statement of facts and of the decisions of the courts herein mentioned make the conclusion which should be reached on this appeal reasonably clear and certain. The vacancy which occurred in the office of the sheriff of Queens county, by reason of the death of the incumbent on October 23, 1916, could not be filled at the general election in that year. (*Matter of Mitchell v. Boyle, supra.*) The special election was properly held on January 23, 1917. (*Matter of Conklin v. Boyle, supra; Matter of Mitchell v. Boyle, supra; Matter of Mitchell v. Prendergast, supra.*) The term of office of the person then elected commenced as of January 23, 1917. (*Matter of Mitchell v. Prendergast, supra.*) His term will not expire until January 23, 1920. (*People ex rel. Lempp v. Board of Elections, supra; People ex rel. Gallup v. Green, 2 Wend. 266; Coutant v. People, 11 Wend. 511; Attorney-General ex rel. Schantz v. Brunst, 3 Wis. 787.*)

If a person should be elected at the general election this year it would be based upon the assertion that the term of the person so elected will commence January 1, 1920. There will be no vacancy in the office on that day. If a person should be chosen at the general election of this year it would result in a conflict of authority made possible by the deliberate action of the courts. Such conflict should not be so precipitated for the purpose of upholding the order appealed from.

This court cannot say that if a person is elected to the office of sheriff at the general election this year he would not take office until January 23, 1920, because there is no legislative or other authority for such a conclusion. It may be assumed that the interests of the electors of the

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county of Queens in having a sheriff in that county duly elected or appointed will be taken care of pursuant to constitutional and statutory authority. Although section 292 of the Election Law does not give authority to the governor to call a special election at the end of the term of the present sheriff, there is ample authority therein for him to appoint a sheriff to continue in office until the beginning of the political year next following the general election of 1920. A sheriff can be elected in the county of Queens at the general election of 1920, who will take office on the first day of January, 1921, for a term of three years. By so doing the statutes and the decisions thereunder will be obeyed and followed and the time for the election of a sheriff in that county will be restored to the general election day and further controversies growing out of the facts herein mentioned will be avoided.

It has been suggested that the governor has no power to appoint a sheriff to take office following the expiration on January 23, 1920, of the term of the present incumbent because section 30 of the Public Officers Law does not include among the enumerated vacancies in office one arising from the expiration of a fixed term.

The Constitution provides that the legislature may declare the cases in which any office shall be *deemed vacant* where no provision is made for that purpose in the Constitution. (Const. art. 10, sec. 8.)

Pursuant to that provision the legislature provided that "every office shall be vacant" upon the happening of certain enumerated events "*before the expiration of the term thereof.*" (Public Officers Law, sec. 30.)

The expiration of a term necessarily creates a vacancy therein, particularly in an office where the incumbent does not hold over after the expiration of his term.

It is said in *People ex rel. Mitchell v. Sohmer* (209 N. Y. 151, 155): "A vacancy by expiration of the term of office is a certain event to occur at a known time. The statute also deals with vacancies that may arise *before the expira-*

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tion of the term of office by death or other event, the time of which is not known." (*People ex rel. Snyder v. Hylan*, 212 N. Y. 236.)

The failure of the legislature to prescribe that an office shall be *deemed vacant* at the expiration of a term of an incumbent lawfully elected thereto, whose successor has not been lawfully elected, does not change the fact that the office is vacant and not occupied by a person duly elected thereto. The statutes quoted show that on and after January 23, 1920, the office of sheriff in Queens county will be without an elected incumbent.

It is urged that the people of the county of Queens are entitled to fill the office of sheriff by election every three years, and that if a sheriff is not elected for that county in the year 1919 the constitutional provision with reference to the term of office will be violated.

The Constitution must be construed in connection with the existing facts. By the terms of the Constitution and statutes the term of office of the present incumbent will not expire until after the first of January following the general election in 1919, and there is no provision for an election of a sheriff to succeed the present incumbent until the general election in the year in which the term of office of the incumbent expires.

The election of a sheriff, therefore, will occur within the third year after the year in which the term began and at the earliest possible date for which provision therefor is made after the end of the term of the incumbent and in the only way possible in compliance with the Constitution and the statutes authorized by it. (*People ex rel. Smith v. Fisher*, 24 Wend. 215, 219, 220.)

The order of the Appellate Division should be reversed and that of the Special Term affirmed, with costs in this court and in the Appellate Division.

HISCOCK, Ch. J., COLLIN, CARDOZO, POUND, CRANE and ANDREWS, JJ., concur.

Order reversed, etc.

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MAURICE H. HARTIGAN et al., Individually and as Copartners under the Firm Name of HARTIGAN & DWYER, Respondents, *v.* CASUALTY COMPANY OF AMERICA, Appellant.

Insurance (liability) — construction of policy — appeal — if terms of policy are unambiguous its construction is a question of law reviewable by the Court of Appeals — partnership as legal entity — where an automobile liability policy insured a firm, as such, and under the firm name, the insurer is not liable for damages for a death caused by the automobile while loaned to another firm of which the members of the insured firm were members.

1. If the terms of a policy of liability insurance are unambiguous, its construction is a question of law for the court, which survives the unanimous decision of the Appellate Division and is subject to review by the Court of Appeals.

2. An automobile liability policy insured plaintiffs under their firm name and as a firm doing business as a department store merchant at a designated place in a designated city, against "loss and expense by reason of claims made upon the assured" by reason of accidents by any person by reason of "the ownership, maintenance or use" of a delivery automobile described in the policy. The firm so insured consisted of two copartners who with a third person as a partner formed another partnership which conducted a department store in another city. While the automobile was being used temporarily in the business of the latter firm in the last-mentioned city and driven by an employee of that firm, a child was run over and killed. The plaintiffs individually paid two-thirds of the amount for which the claim was settled and brought this action to recover the amount thus paid. The terms of the policy are unambiguous and limit the liability of the insurer to accidents which occurred while the automobile was used in the firm business of the firm named in the policy. Hence the policy cannot be so construed as to bring within its terms the individual liability of the plaintiffs as members of the other partnership for the injury arising out of the accident.

3. The fiction that a partnership is a legal entity is recognized among business men and in construing commercial contracts.

Hartigan v. Casualty Co. of America, 178 App. Div. 942, reversed.

(Argued October 13, 1919; decided October 21, 1919.)

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APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered May 3, 1917, affirming a judgment in favor of plaintiffs entered upon a decision of the court at a Trial Term without a jury.

The nature of the action and the facts, so far as material, are stated in the opinion.

Colin McLennan, M. J. Wright and Clarence H. Fay for appellant. The contract of insurance indemnified only the firm of Hartigan & Dwyer. The insurer contemplated only the risk incident to the use of the automobile by that firm, and cannot be held to have contemplated any other or greater hazard. (*Cornell v. Travelers' Ins. Co.*, 175 N. Y. 239; *Cremo Light Co. v. Parker*, 118 App. Div. 845; *Dundee Chemical Works v. N. Y. Ins. Co.*, 12 Misc. Rep. 353; *G. F. Ins. Co. v. Home Ins. Co.*, 144 N. Y. 195; *Dey v. Poughkeepsie Ins. Co.*, 23 Barb. 623; *Royal Ins. Co. v. Martin*, 192 U. S. 149; *Malley v. Atl. Ins. Co.*, 51 Conn. 222; *Biggs v. Ins. Co.*, 88 N. C. 141; *G. F. Ins. Co. v. H. Ins. Co.*, 144 N. Y. 195; *White v. Maryland Casualty Co.*, 139 App. Div. 179; 206 N. Y. 704.) The finding of the trial court that the defendant insured "the plaintiffs and each of them" is inconsistent with the terms of the contract as found and pleaded, and the defendant duly excepted to this finding. The policy clearly and plainly limited the defendant's liability as indemnitor to the copartnership of Hartigan & Dwyer and the question is open for review. (*Poel v. Brunswick-Balke-Collender Co.*, 216 N. Y. 310; *Cont. Ins. Co. v. N. Y. & Harlem R. R. Co.*, 187 N. Y. 225; *Kelly v. Security Mutual Life Ins. Co.*, 186 N. Y. 16.)

William E. Woppard and Louis J. Rezzemini for respondents. The decision of the Appellate Division being unanimous, the findings of fact made by the trial court are conclusive on this appeal. (N. Y. Const. art. 6, § 9; Code Civ. Pro. § 191, subd. 3; *Genet v. D. &*

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H. Canal Co., 167 N. Y. 608; *Kissam v. U. S. Printing Co.*, 199 N. Y. 76; *Matter of Plass v. C. N. E. Ry. Co.*, 226 N. Y. 449; *McManus v. McManus*, 179 N. Y. 338; *Ide v. Brown*, 178 N. Y. 26.) In construing the policy all doubts must be resolved in favor of the insured. (*Rolker v. Great Western Ins. Co.*, 4 Abb. Ct. App. Dec. 76, 82; *Hoffman v. Aetna F. Ins. Co.*, 32 N. Y. 405; *Rickerson v. Hartford Fire Ins. Co.*, 149 N. Y. 307; *Imperial Shale Brick Co. v. Jewett*, 169 N. Y. 143; *Michael v. Prussian Nat. Ins. Co.*, 171 N. Y. 25; *Coykendall v. Blackmer*, 161 App. Div. 11, 18; *Cary Brick Co. v. Fidelity, etc., Co.*, 162 App. Div. 873; *McLaughlin v. W. C. Mut. Ins. Co.*, 23 Wend. 525; *Grijfey v. New York Cent. Ins. Co.*, 100 N. Y. 417; *Herman v. Merchants' Ins. Co.*, 81 N. Y. 184; *Baley v. Homestead F. Ins. Co.*, 80 N. Y. 21; *Press Pub. Co. v. General Acc., etc., Assur. Corp.*, 160 App. Div. 537, 540.) The policy covers a loss sustained by plaintiffs as individuals. (*Jones v. Blun*, 145 N. Y. 333; *Matter of Peck*, 206 N. Y. 55; *Kavanaugh v. McIntyre*, 210 N. Y. 175; *Roberts v. Johnson*, 58 N. Y. 613.)

POUND, J. Defendant issued an automobile liability policy insuring "Hartigan & Dwyer, No. 85-91 Congress St., Troy, Rensselaer County, New York, Department store merchant," against "loss and expense by reason of claims made upon the assured" by reason of accidents suffered by any person by reason of "the ownership, maintenance or use" of a delivery automobile described in the policy. Hartigan & Dwyer is a copartnership composed of Maurice H. Hartigan and Joseph E. Dwyer. The copartnership of Hartigan, Dwyer & O'Brien consists of the same individuals as the firm of Hartigan & Dwyer and one John J. O'Brien. It conducts a department store in Albany. When the automobile was being used in the business of the Albany firm and driven by an employee of that firm, a child was run over and killed.

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The plaintiffs paid two-thirds of the amount for which the claim against the Albany firm arising out of the accident was settled and have maintained successfully an action on the policy to recover the amount thus paid by them. The question is whether the policy may be so construed as to bring within its terms such individual liability.

The plaintiffs direct attention to the findings of fact, unanimously affirmed, that the policy insures the plaintiffs "and each of them" and that at the time of the accident the automobile was in use "by an agent of the plaintiffs and one John J. O'Brien." The policy is incorporated in the decision. If its terms are unambiguous, its construction is a question of law for the court, which survives the unanimous decision of the Appellate Division and is subject to review by this court. (*Poel v. Brunswick-Balke-Collender Co.*, 216 N. Y. 310.)

We think that the terms of the policy are unambiguous and limit the liability of the insurer to accidents which happen while the automobile is being used on the firm business of Hartigan & Dwyer.

The plaintiffs have succeeded on the theory that they are individually liable for the torts of the firm of Hartigan, Dwyer & O'Brien (*Matter of Peck*, 206 N. Y. 55), but it is the firm of Hartigan & Dwyer, described in the policy as "department store merchant," that is insured and that firm has committed no wrong and incurred no liability. Hartigan and Dwyer, as individual members of the firm of Hartigan, Dwyer & O'Brien, are not insured against liability for the acts of that firm. When a partnership is established, the liability of the individual partners is an incident of the partnership, merely, not a separate and independent liability. The policy protects Hartigan & Dwyer from loss by reason of automobile accidents for which their partnership is liable and to that extent protects them individually as members of such firm; but the Troy partnership as such is not a

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member of and is not liable for the torts of the Albany partnership.

Furthermore, for the purpose of keeping partnership accounts, merchants constantly resort to the fiction that a partnership is a legal entity, separate and distinct from the partners therein. This rule of convenience is particularly serviceable to keep apart two firms having a common member. (*Jones v. Blun*, 145 N. Y. 333.) The partnerships in this case are not for all purposes to be regarded as legal entities, but for the purpose of ascertaining the intention of the parties to the policy herein, we are governed by common parlance rather than legal parlance.

Speaking of a mortgage executed by John Thompson to secure the payment of all promissory notes made by him, this court said: "We think that among business men a distinction is made between the firm, as an entity, and the members who compose it, and that this language would not be understood as broad enough to cover the indebtedness of a firm of which Thompson was a member, and for whose debts, jointly with the other members of the firm, he could be made responsible." (*Bank of Buffalo v. Thompson*, 121 N. Y. 280, 283.) So here, we think that among business men a distinction is made between the firm of Hartigan & Dwyer and the members who compose it and that the policy is not broad enough to cover the liability of the members of the firm for which the firm itself was not liable.

The fact that the courts below have read the policy otherwise and found it susceptible of another meaning is urged as establishing the fact that reasonable and intelligent men may honestly differ as to its meaning and that it must, therefore, be construed against the insurer. It is, however, for this court to say, as matter of law, whether reasonable men may reasonably differ as to such meaning, or whether the indulgence of the lower courts has not written a new contract for the parties and extended the defendant's liability beyond the plain and unam-

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biguous language of the policy. As a legal proposition, we must first find that the contract is ambiguous, before we may apply the rules governing the construction of ambiguous contracts.

The judgments should be reversed and complaint dismissed, with costs in all courts.

HISCOCK, Ch. J., CHASE, COLLIN, CARDOZO, CRANE and ANDREWS, JJ., concur.

Judgments reversed, etc.

THE CITY OF NEW YORK, Appellant, *v.* FREDERICK W. WHITRIDGE, as Receiver of the DRY DOCK, EAST BROADWAY AND BATTERY RAILROAD COMPANY, Respondent.

Street railroads — Railroad Law — construction and application of section 178.

Under the provisions of the Railroad Law (Cons. Laws, ch. 49, § 178) a city which has removed a street pavement in order to make a sewer improvement may require a street railroad, running through the street, to restore the pavement between its tracks and for a space of two feet outside thereof.

City of New York v. Whitridge, 187 App. Div. 882, reversed.

(Argued October 14, 1919; decided October 24, 1919.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 21, 1919, unanimously affirming a judgment in favor of defendant entered upon an order of Special Term sustaining a demurrer to and directing a dismissal of the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

William P. Burr, Corporation Counsel (John F. O'Brien and Harold N. Whitehouse of counsel), for appellant. The financial responsibility for restoring the pavement

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after the completion of repairs to the sewer rested upon defendant. (L. 1884, ch. 252, § 9; Cons. Laws, ch. 49, § 178; *Conway v. City of Rochester*, 157 N. Y. 33; *Mayor, etc., of N. Y. v. H. B., M. & F. Ry. Co.*, 186 N. Y. 304; *Hayes v. Brooklyn H. R. R. Co.*, 200 N. Y. 183, 186; *Matter of Uvalde Cont. Co.*, 219 N. Y. 287; *Mayor v. Broadway R. Co.*, 130 App. Div. 834; *City of N. Y. v. N. Y. City Ry. Co.*, 132 App. Div. 156; *City of N. Y. v. Brooklyn, Q. C. & S. Ry. Co.*, 156 App. Div. 860; *City of N. Y. v. Linch*, 161 App. Div. 292; *Village of Mechanicville v. S. & M. S. Ry. Co.*, 35 Misc. Rep. 513; 174 N. Y. 507; *Malone v. Spuyten Duyvil*, 65 Misc. Rep. 370; *Weed v. Common Council*, 26 Misc. Rep. 208.)

Herbert J. Bickford for respondent. The defendant's liability, if any, depends wholly upon section 178 of the Railroad Law. (*Mayor v. N. Y. & Harlem R. Co.*, 46 N. Y. S. R. 349; 139 N. Y. 643; *Mayor v. Bleecker St. & F. F. R. Co.*, 130 App. Div. 830; *Mayor, etc., v. Eighth Ave. R. Co.*, 7 App. Div. 84; *Dry Dock, E. B. & B. Ry. Co. v. Mayor, etc.*, 55 Barb. 298; *Matter of Deering*, 93 N. Y. 361; *Brooklyn El. R. Co. v. City of Brooklyn*, 2 App. Div. 98; *N. O. Gas Light Co. v. Drainage Comm.*, 197 U. S. 453; *Stern v. International Ry. Co.*, 220 N. Y. 284; *Chace Trucking Co. v. Richmond L. & R. Co.*, 225 N. Y. 435.) Section 178 of the Railroad Law relates only to repairs of pavements in the railroad area, and does not require street surface railroad companies to remove them for the sole purpose of enabling local authorities to construct public works, or to restore them when such works are finished. (*People ex rel. B. & L. E. Traction Co. v. Tax Comrs.*, 209 N. Y. 496; *City of New York v. New York Railways Co.*, 183 App. Div. 896; *Guaranty Trust Co. v. Second Ave. R. Co.*, N. Y. L. J. Nov. 21, 1916; *Creem Co. v. City of New York*, 188 App. Div. 169; *City of New York v. Brooklyn Heights R. Co.*, 188 App. Div. 131; *Lewis v. City of New York*, 178 App. Div.

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929; *Swift v. Brooklyn Heights R. Co.*, 134 App. Div. 134; *People ex rel. T. A. R. R. Co. v. Newton*, 112 N. Y. 396.)

POUND, J. The only question argued on this appeal is whether the city, after having removed a street pavement in order to make a sewer improvement, may under the provisions of section 178 of the Railroad Law (Cons. Laws, ch. 49) require the defendant street railroad to restore the pavement between its tracks and for a space of two feet outside thereof.

The language of the statute is broad:

"Every street surface railroad corporation, so long as it shall continue to use or maintain any of its tracks in any street, avenue or public place in any city or village, shall have and keep in permanent repair that portion of such street, avenue or public place between its tracks, the rails of its tracks, and two feet in width outside of its tracks, under the supervision of the proper local authorities, and whenever required by them to do so, and in such manner as they may prescribe. In case of the neglect of any corporation to make pavements or repairs after the expiration of twenty days' notice to do so, the local authorities may make the same at the expense of such corporation, * * *."

It has been held repeatedly that the local authorities are vested with the power to determine when and how the repairs should be made at the expense of the street railroad corporation, even to the extent of requiring a new pavement to be laid. (*Mayor, etc., of New York v. Harlem Bridge, M. & F. Ry. Co.*, 186 N. Y. 304.) "The duty of keeping such portion of the streets in permanent repair (by the railroad company) * * * is commanded." (*Conway v. City of Rochester*, 157 N. Y. 33, 38.) It is a duty imposed for the pecuniary benefit of the municipality. No exemption from any burden of repavement is suggested by the language of the statute as thus construed.

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The courts below have reached the conclusion that the statute should now be read with a proviso to the effect that the duty of repaving is limited to the restoration of pavements following surface improvements and that it has no application to the necessary restoration of the pavement following a sewer improvement. Much might be said on the policy of thus limiting the application of the statute, but the argument directs itself to the legislature rather than the court. The distinction drawn between surface improvements and sub-surface improvements rests, not on the language of the statute, but on the theory that "the legislature could not have intended that the statute should cover any case where the repairs are made necessary by the direct, even though lawful interference of the city with the street surface." The legislative intent is found in the legislative language which, as this court has had occasion to say, unqualifiedly commands. The duty is not dependent upon conditions that the railroad creates, such as the interference with the surface of the highway due to the presence of the railroad tracks in the street. The language of the first sentence of section 178 includes every repavement, "and that it was thus used advisedly is further evidenced by the very next sentence, which provides that 'in case of the neglect of any corporation to *make pavements* * * * the local authorities may make the same at the expense of such corporation.'" (*Conway v. City of Rochester*, 157 N. Y. 33, 41.)

The judgments should be reversed and the demurrer overruled; with costs in all courts, with leave to defendant to answer, at any time within twenty days, on payment of costs.

CHASE, COLLIN, CARDOZO, CRANE and ANDREWS, JJ., concur; HISCOCK, Ch. J., not voting.

Judgments reversed, etc.

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SCHWARTZ & COMPANY, INCORPORATED, Respondent, v.
AIMWELL COMPANY, INCORPORATED, et al., Appellants.

Principal and surety—pleading—bond by tenant and surety to pay all mechanics' liens and claims of builders for improvements on premises occupied by tenant—when complaint in action by landlord to recover penalty of bond does not state facts sufficient to constitute a cause of action.

The defendants, as principal and surety respectively, executed a bond, one of the conditions of which is that the principal therein would "pay, satisfy and discharge all claims of builders, mechanics, materialmen, etc., who shall furnish materials or perform work" in making certain changes upon the property of plaintiff's assignor. The complaint alleges failure to comply with this condition, to which the defendants interposed a demurrer. There is no allegation in the complaint, nor any allegation from which such facts can be inferred, that plaintiff's assignee has sustained or will sustain any damage whatever by reason of such failure and neglect. Nor are there any allegations to the effect that liens have been or are threatened to be filed by reason of such failure. The omission of such allegations renders the complaint defective.

Schwartz & Co. v. Aimwell Co., 187 App. Div. 950, reversed.

(Submitted September 20, 1919; decided October 24, 1819.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered March 4, 1919, which affirmed an order of Special Term overruling demurrers to the complaint.

The following question was certified: "Does the complaint state facts sufficient to constitute a cause of action?"

The facts, so far as material, are stated in the opinion.

Otto A. Samuels and Horace G. Marks for appellants. The undertaking is clearly one of indemnity against either actual loss or liability to loss. For the purposes of this appeal it is immaterial which: (*Belloni v. Freeborn*, 63 N. Y. 383; *Gamble v. Cuneo*, 21 App. Div. 413; 162

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N. Y. 634; *Sachs v. American Surety Co.*, 72 App. Div. 60; *Richardson v. Steuben County*, 226 N. Y. 13; *Nat. Mechanics Assn. v. Conkling*, 90 N. Y. 116; *Winters v. Judd*, 59 Hun, 32; *Zipp v. Fidelity & Deposit Co.*, 73 App. Div. 20; *City of New York v. Sexton*, 96 App. Div. 184; *Northern Assur. Co. v. Borgelt*, 67 Neb. 282; *American B. & L. Assn. v. Waleen*, 52 Minn. 23; *Westcott v. Fidelity & Deposit Co.*, 87 App. Div. 497; *Burr v. Union Surety Co.*, 107 App. Div. 315.) It being a bond of indemnity, plaintiff must allege actual loss or liability to loss. (*Gilbert v. Wiman*, 1 N. Y. 550; *Kohler v. Matlage*, 72 N. Y. 259; *Miller v. Miller Knitting Co.*, 23 Misc. Rep. 404.)

Abraham H. Sarasohn for respondent. The undertaking is clearly an absolute promise to pay any amount unpaid for labor and material of the alteration, and is not merely a promise to indemnify against actual loss or liability to loss. (*Gilbert v. Wiman*, 1 N. Y. 554; *Thomas v. Allen*, 1 Hill, 146; *Kohler v. Matlage*, 72 N. Y. 259; *Bristoe v. McBear*, 1 App. Div. 217.) The bond in suit, being a promise to pay and not a mere agreement to indemnify, plaintiff need not allege or prove actual loss or liability in order to maintain action. (*Belloni v. Freeborn*, 63 N. Y. 383.) The preamble and the conditions of the bond show upon the face thereof a promise by the obligee to pay for labor and materials therein mentioned; and not a mere indemnity to the obligor against loss or liability. (*McGillis v. McGillis*, 154 N. Y. 548; 2 Story on Equity, 1237; *National Wall Paper Co. v. Sire*, 163 N. Y. 122; *Rice v. Culver*, 172 N. Y. 60; *N. Y. Elevator Supply & R. Co. v. Bremer*, 175 N. Y. 520; *Pope v. Hecksher*, 190 N. Y. 508; *Tinsley v. Smith*, 194 N. Y. 581; 115 App. Div. 708; *Helling v. Blumenberg*, 55 Hun, 605; *Monroe v. Douglass*, 5 N. Y. 447; *Chapin v. Dolson*, 78 N. Y. 74; *Stewart v. Mutual Life Ins. Co.*, 155 N. Y. 257.)

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McLAUGHLIN, J. The plaintiff, as the assignee of D. A. Schulte, Inc., brings this action to recover the penalty of a bond executed and delivered to it by the defendant Aimwell Company, Inc., as principal, and National Surety Company as surety. The bond is not annexed to or made a part of the complaint, but its essential features are therein set forth. The recitals in the bond are that the aforesaid principal is about to make certain alterations and improvements in the premises at the southeast corner of Main and Elm streets in the city of Bridgeport, Conn., which are occupied under a lease from D. A. Schulte, Inc., and has requested it to consent that such changes be made; that such consent is given on condition that: (a) Aimwell Company, Inc., will pay, satisfy and discharge all claims of builders, mechanics, materialmen, etc., who shall furnish materials or perform work in making such changes; (b) perform the work according to certain plans and specifications; and (c) complete the work by October 15, 1917; that if such conditions be complied with, then the obligation will be of no effect, otherwise to be in full force. The complaint then alleges that the Aimwell Company, Inc., did not perform one of the conditions specified in the bond, in that it failed and neglected to pay builders, mechanics and materialmen, and others, who performed work and furnished materials to the amount and reasonable value of \$8,000, for which sum judgment was demanded. The defendants separately demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrers were overruled. An appeal was then taken by each defendant to the Appellate Division, where the judgment was affirmed and, by permission, they now appeal to this court.

There is no allegation in the complaint, nor any allegation from which such fact can be inferred, that D. A. Schulte, Inc., has or will sustain any damage whatever by reason of the failure and neglect of the Aimwell

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Company, Inc., to pay and discharge such claims. Nor are there any allegations to the effect that liens have been or are threatened to be filed by reason of such failure. The omission of allegations to this effect renders the complaint defective. The character and purpose of the bond clearly appear from its terms. The recitals indicate such intent on the part of the parties to it. D. A. Schulte, Inc., was the landlord; Aimwell & Company Inc., the tenant. The tenant desired to make certain alterations in the building occupied by it, and to this end sought the consent of the landlord, which was given on condition, among others, that the Aimwell Company, Inc., with the surety company as surety, would pay and discharge all claims of builders, mechanics, etc. If such claims were not paid, then the persons performing work or furnishing materials might file mechanics' liens against the real estate and thereby obligate the landlord to pay for the same. It was to protect him against this contingency that the bond was given. The penal sum of \$8,000 was inserted, not as a penalty to be paid in case of a breach of the condition, nor as liquidated damages, but merely for the purpose of both protecting the landlord and limiting the obligation of the covenantors to that amount.

So far as appears from the complaint, D. A. Schulte, Inc., has no personal interest in the unpaid claims referred to. It has not paid any of them and is not personally liable for their payment. As indicated, no mechanics' liens have been filed, nor are any threatened. Under such circumstances, the plaintiff could not voluntarily pay such claims and then recover the amount paid from the principal or surety on the bond. To enable it to do that there must, as stated in *Village of Argyle v. Plunkett* (226 N. Y. 306) be involved somewhere, as an essential element of its right to recover, damages which have or may be suffered by reason of the failure to pay these claims and such element is here utterly lacking.

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It follows, there being no allegations in the complaint that D. A. Schulte, Inc., has or is likely to sustain any damage by reason of the breach of the conditions in the bond, or any allegation from which such fact can be inferred, the demurrs should have been sustained.

The orders of the Appellate Division and Special Term should be reversed and the demurrs sustained, with leave to the plaintiff to serve an amended complaint on payment of the costs in all courts. The question certified is answered in the negative.

HISCOCK, Ch. J., CHASE and ANDREWS, JJ., concur; HOGAN, CARDODOZO and POUND, JJ., dissent.

Orders reversed, etc.

SARANAC LAND AND TIMBER COMPANY, Respondent, v.
JAMES A. ROBERTS, as Comptroller of the State of
New York, Appellant.

Supreme Court — duration of terms thereof — Extraordinary Special and Trial Terms have same jurisdiction as any other term — when an Extraordinary Term is convened for the disposal of business which may be brought before it, it is deemed to continue until the decision of motions submitted although it has expired for the purpose of new business.

1. There is no provision of the Constitution or general provision of statute which limits the duration of a term of the Supreme Court when once duly called and convened.

2. When a term of court is ended for new and further business, it may be deemed continued for the purpose of deciding cases and matters finally submitted to it during its regular and formal sittings. (Code Civ. Pro. § 45.)

3. The statement of the purpose of the term in a proclamation convening an Extraordinary Special and Trial Term does not enlarge or diminish the rights of litigants. It becomes a term of the Supreme Court with the same jurisdiction that belongs to any other term.

4. Where by the express direction of the proclamation convening such a term, it was to continue "So long as may be necessary for the disposal of the business which may be brought before it," it should be deemed to continue for the purpose of a final decision of the motions

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theretofore submitted although it had expired for the purpose of new business.

5. A question of law is presented on this appeal, whether upon all the facts as shown in the record about which there is no material controversy, the Extraordinary Special Term in question remained in existence for the purpose of finally disposing of the business before it. Hence this court is not precluded from reviewing the unanimous decision of the Appellate Division.

Saranac Land & Timber Co. v. Roberts, 187 App. Div. 361, reversed.

(Argued September 29, 1919; decided November 18, 1919.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 2, 1919, which reversed an order of Special Term denying a motion to vacate and set aside a prior order made at an Extraordinary Special Term by which a referee was appointed to hear, try and determine the issues in the action and granted said motion.

The following question was certified: "Did the Extraordinary Special Term which had been convened by the Governor still lawfully exist at the time it entertained the motion on the remittitur from the Court of Appeals and from this court, and did it have jurisdiction to entertain and decide the motion?"

The facts, so far as material, are stated in the opinion.

Charles D. Newton, Attorney-General (*Wilber W. Chambers* of counsel), for appellant. The order made at the Special Term presided over by Mr. Justice CLARK is valid. (*Cailin v. Adirondack Co.*, 19 Hun, 389; *People v. C. C. Bank*, 35 How. Pr. 428; *People ex rel. Weick v. Warden*, 117 App. Div. 154.)

Thomas F. Conway and *Frank E. Smith* for respondent. The Extraordinary Special Term appointed by law (through the act of the governor) to be held in and for Schenectady county on March 17, 1917, ended in July, 1917. (*Stoval v. Emerson*, 20 Mo. App. 322; *Wright v. Wallbaum*, 39 Ill. 554; *People v. Sullivan*, 49 Hun, 333;

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115 N. Y. 185; *Loewe v. Union Savings Bank*, 222 Fed. Rep. 342; *Stewart v. Palmer*, 74 N. Y. 183.) The Extraordinary Term having come to an end in July, 1918, has not been recreated or brought back to life by anything happening since. (*Tilton v. Beecher*, 59 N. Y. 176.) The recitals in the order that it is an order of the Extraordinary Special Term are not conclusive. (*Matter of Whitman*, 225 N. Y. 1.) There was no jurisdiction in the court to make the order in question as when and where it was made. (*Armstrong v. Loveland*, 99 App. Div. 28; *Gould v. Bennett*, 59 N. Y. 124; *Matter of Wadley*, 29 Hun, 12; Code Civ. Pro. § 769; *Attrill v. Rockaway Beach Imp. Co.*, 25 Hun, 376; *Pinkney v. Hegerman*, 4 Lans. 374; 53 N. Y. 31.)

CHASE, J. This is one of two actions similarly entitled, each brought to recover the immediate possession of real property. It has been tried three times. (See opinion *Saranac Land & Timber Co. v. Roberts*, 224 N. Y. 377.) After the judgment entered upon the report of the referee who heard and decided the issues on the third trial, and on February 27, 1917, the governor appointed an Extraordinary Special and Trial Term of the Supreme Court to be held at the Schenectady county court house in the city of Schenectady on a day therein named, "For the purpose of hearing and determining motions for new trials in the two actions entitled Saranac Land and Timber Company against James A. Roberts as comptroller of the state of New York, defendant, and that in the event new trials are granted then to try said actions."

William W. Clark, a justice of the Supreme Court in the seventh judicial district, was appointed to hold said Extraordinary Special and Trial Term, and it was held by him pursuant to such appointment. Such term of the Supreme Court so appointed was regularly proclaimed and legally constituted. (*People ex rel.*

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Saranac Land & Timber Company v. Supreme Court, 220 N. Y. 487; People v. Neff, 191 N. Y. 210.)

There is no provision of the Constitution or general provision of statute which limits the duration of a term of the Supreme Court when once duly called and convened. (*People ex rel. Weick v. Warden of City Prison, 117 App. Div. 154; affd., on opinion of Appellate Division, 188 N. Y. 549.*)

The statement in the proclamation of the purpose of the term does not enlarge or diminish the rights of litigants. It became a term of the Supreme Court with the same jurisdiction that belongs to any other term. (*People ex rel. Saranac Land & Timber Company v. Supreme Court, supra.*) By the express direction of the proclamation the term was to continue "So long as may be necessary for the disposal of the business which may be brought before it."

A motion was made at such Extraordinary Special Term by the defendant for a new trial of this action on the ground of newly-discovered evidence and also to vacate and set aside the consent of defendant that the action be tried by a referee and also that in case a new trial should be granted and the consent that the action be tried by a referee be not set aside, then for the appointment of a new referee. Such motions were heard and duly submitted for determination. The court granted the new trial but refused to set aside the consent of the defendant to the trial of the action before a referee. It named a new referee, holding in substance and as a matter of law that it was the duty of the court to appoint a new referee. On appeal to the Appellate Division the order was affirmed as modified in a part not material on this appeal. (*Saranac Land & Timber Company v. Roberts, 183 App. Div. 897.*) Leave was granted to appeal to this court from a part of said order. (*Saranac Land & Timber Company v. Roberts, 184 App. Div. 892.*) This court held that the Extraordinary Special Term and

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the Appellate Division were in error in assuming that the appointment of a new referee upon the facts then before the court was mandatory, and further held that the court had power to name a new referee in the exercise of its judgment and discretion. The order so far as appealed from was reversed and "The motion so far as the appointment of another referee is concerned remitted to the *Special Term for further consideration upon the facts before it.*" The only Special Term that had the facts before it was the Extraordinary Special Term held by Justice CLARK, before which Special Term the motions were submitted, but in which the judgment and discretion of the court had not for the reason stated been exercised.

The history of that Special Term shows that on June 16, 1917, the day when the motions were finally submitted to the court for decision, an adjournment was taken to a subsequent day and on such day the court was again adjourned until July 28, 1917. On July 28, 1917, no formal action was taken either to adjourn the court *sine die* or otherwise. It is interesting and significant that the order made following the submission of the motions on June 16, 1917, although dated June 16, 1917, was actually made and entered on July 17, 1917, a day to which the Extraordinary Special Term had not been formally adjourned, all parties apparently assuming that after the submission of the motions the court for the purpose of such motions remained in continuous existence until the final decision thereof.

After the decision of this court (224 N. Y. 377) Justice CLARK in the exercise of the discretion and judgment vested in the Extraordinary Special Term made an order which is entitled: "At an extraordinary special term of the supreme court held at the Schenectady county court house in the city of Schenectady on the 17th and 31st days of March, the 24th day of April, the 16th day of May and the 16th day of June, 1917, and continued for the further consideration of the motion remanded to it by the court

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of appeals pursuant to the judgment of the court of appeals dated November 13, 1918." Such order appointed a referee to hear, try and determine the issues in this action. A motion was then made at a Special Term to set aside and vacate the order so made on the ground that the Extraordinary Special Term had expired July 28, 1917. The motion was denied. An appeal was taken therefrom to the Appellate Division where the order was reversed and the order made at the Extraordinary Special Term set aside and vacated. It is from the order so made at the Appellate Division that this appeal is taken. The only question presented on this appeal is whether the Extraordinary Special Term remained in existence for the purpose of finally deciding the motions theretofore made at such term. It is urged that there is no question of law in this case that the court can consider. The decision of the Appellate Division from which this appeal is taken was unanimous, but this court is only precluded from reviewing a unanimous decision of the Appellate Division when such decision is "That there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court." (Constitution, art. 6, sec. 9; Code of Civil Procedure, § 191, subd. 3.) The decision of the Appellate Division in this case was a reversal of the order of the Special Term. A question of law is presented on this appeal, and it is whether upon all the facts as shown in the record about which there is no material controversy, the Extraordinary Special Term remained in existence for the purpose of finally disposing of the business before it. We repeat that the term was appointed to continue "so long as may be necessary for the disposal of the business which may be brought before it." It will be assumed that as to any new business the Extraordinary Trial and Special Term ceased to exist in July, 1917.

It is necessary that the times and places of holding

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courts be fixed in advance that jurors can be drawn therefor, and that notices can be given and the necessary steps taken to obtain jurisdiction of the parties in civil and criminal actions and proceedings.

The Constitution expressly provides that "The justices of the Appellate Division in each department shall have power to fix the times and places for holding the special terms therein, and to assign the justices in the departments to hold such terms; or to make rules therefor." (Constitution, article 6, sec. 2; Judiciary Law, sec. 84.) An Extraordinary Special or Trial Term of the Supreme Court can be called by the governor. (Judiciary Law, sec. 153.) Business before the court as such must, of course, be done within a term duly appointed and held. Our inquiry is, whether after a term has been duly appointed and convened, and a motion is made or a trial had therein, if the decision thereof is not rendered until such term has expired by express limitation or by failure to adjourn it formally, shall such term be deemed continued for the purpose of making and filing such decision. The answer to this question is more important than would appear from a casual statement of the proposition.

It would not be an exaggeration to say that there are thousands of cases every year in this state, in which motions are made or trials had in court during terms thereof duly appointed and held and in which the decisions or orders therein are not entered, signed, or made until the terms of court at which the motions were so made and issues tried had ceased to exist for the hearing of new business. The terms of court in all or at least part of the state are appointed not only for a particular day but to continue for a fixed period of time or until adjourned without day. (See Special Rules of First Department, Supreme Court; Trial Term, rule 4; Special Terms, rules 1, 4 and 7.)

Many of the cases tried or questions heard at such

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terms are not and cannot be decided until long after the time when such terms are last formally adjourned.

It is expressly provided by section 45 of the Code of Civil Procedure that "Where the trial or hearing of an issue of fact, joined in an action or special proceeding, civil or criminal, has been commenced at a term of a court of record, it may notwithstanding the expiration of the time appointed for the term to continue, be continued to the completion thereof; including, if the cause is tried by a jury, all proceedings taken therein until the actual discharge of the jury; or, if it is tried by the court without a jury, until it is finally submitted for a decision upon the merits."

The Code provision is a recognition that a trial can continue "*Notwithstanding the expiration of the time appointed for the term to continue,*" and in case of a trial by the court "*until it is finally submitted for a decision upon the merits.*"

Although the section of the Code quoted does not expressly provide that a term shall continue after a cause is finally submitted to the court and until a decision thereof, it was not the purpose of the statute to prevent a decision of a cause or question finally submitted to the court even if such term is not formally adjourned to a time beyond that at which a decision or order therein and the resettlement thereof is finally made and signed.

When a term of court is ended for new and further business, it may be deemed continued for the purpose of deciding cases and matters finally submitted to it during its regular and formal sittings. (*Schultze v. Huttlinger*, 150 App. Div. 489, 492; *Walker v. Moser*, 117 Fed. Rep. 230; *Harrison v. German Am. Fire Ins. Co.*, 90 Fed. Rep. 758; *Cheesman v. Hart*, 42 Fed. Rep. 98; *Woffenden v. Charouleau*, 11 Pac. Rep. [Ariz.] 61; *Shenck v. Birdseye*, 2 Ida. 141; *State v. Rye*, 35 N. H. 368; *Yatter v. Miller*, 61 Vt. 147; *Tyson v. Glaize*, 23 Gratt. [Va.] 799.)

All legislative enactments should be construed in

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recognition of the practice which is general and long continued of making decisions in matters tried, argued and submitted at Special and Trial Term on the assumption that for the purpose of such decision the Special or Trial Term continues in existence. The order of the Special Term now under consideration was made and signed by the justice before whom the Extraordinary Special Term was regularly held at Schenectady and was entitled in such Special Term. The fact that such justice signed said order when he was not in the court house at Schenectady is not important in view of the fact that the motions were submitted to the court at the place and during the time when it was actually held as such.

We are of the opinion that although the Extraordinary Special Term had expired for the purpose of new business, it should be deemed to continue for the purpose of a final decision of the motions submitted at such Extraordinary Special Term on the 16th day of June, 1917.

The order signed July 17, 1917, contained but a partial determination of the questions before the court. The motion was remitted to that court to complete the findings or decision. The remission of the motion to the Special Term was not in any sense a new and independent step in the action. It was a necessary part of the decision of the original motion.

The order of the Appellate Division should be reversed and that of the Special Term denying the motion of the plaintiff to set aside the order of the Special Term held by Justice CLARK should be affirmed, with costs in this court and in the Appellate Division, and the question certified so far as it affects the determination of this appeal is answered in the affirmative.

HISCOCK, Ch. J., HOGAN, CARDOZO, POUND and ANDREWS, JJ., concur; McLAUGHLIN, J., not voting.
Ordered accordingly.

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IDA MINTZ, Respondent, *v.* INTERNATIONAL RAILWAY COMPANY, Appellant.

Negligence — sudden stopping of street car to avoid running over child — when negligence cannot be predicated thereon.

The sudden stopping of a street car when necessary to avoid running over a child on the track, although resulting in shaking, displacing and jerking the passengers, does not evince a disregard of their safety, and negligence cannot be predicated thereon.

Mintz v. International Ry. Co., 177 App. Div. 942, reversed.

(Submitted October 13, 1919; decided November 18, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 21, 1917, affirming a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

Harold S. Brown for appellant. The defendant was not negligent. (*C. C. R. Co. v. Osborn*, 66 Ohio St. 45; *Craig v. B. El. R. Co.*, 207 Mass. 548; *Niland v. B. El. R. R. Co.*, 213 Mass. 522; *Cockhill v. C. & S. R. Co.*, 69 N. J. L. 97; *Stewart v. C. V. R. R. Co.*, 86 Vt. 398.)

Israel G. Holender for respondent. Whether there was prior negligence on the part of the motorman in the management and operation of the car was properly left to the jury as a question of fact. (*Utess v. Erie R. R. Co.*, 204 N. Y. 324; *Bowen v. N. Y. C. R. R. Co.*, 18 N. Y. 408; *Brown v. N. Y. C. R. R. Co.*, 34 N. Y. 404; *Zimmer v. Third Ave. R. R. Co.*, 36 App. Div. 265; *Maverick v. Eighth Ave. R. R. Co.*, 36 N. Y. 378; *Coddington v. Brooklyn Crosstown R. R. Co.*, 102 N. Y. 66; *Levine v. Brooklyn, Queens Co. & Sub. R. R. Co.*, 134 App. Div. 606; *Palmer v. President, etc., D. & H. R. R. Co.*, 120 N. Y. 170; *Keegan*

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v. *Third Ave. R. R. Co.*, 34 App. Div. 297; 165 N. Y. 622;
Loudon v. E. A. R. R. Co., 162 N. Y. 380.)

COLLIN, J. The action is to recover damages resulting from personal injuries caused by the alleged negligence of the defendant. The judgment of the Trial Term consequent upon the verdict in favor of the plaintiff was affirmed by the non-unanimous decision of the Appellate Division. If there was not evidence tending to support the verdict, the denial of the defendant's motion that the complaint be dismissed and the submission of the case to the jury were errors.

Under the evidence the jury might have found as the facts most favorable to the plaintiff: the plaintiff boarded a standing street car operated by the employees of the defendant; as she was walking to a seat the car started; before she had seated herself and as the car had attained the speed of eight miles an hour the sudden stopping of the car threw her to the floor and she received the injuries complained of; the car so stopped because a boy ran upon the track upon which the car was proceeding from the rear of a wagon traveling upon the adjoining or fellow track in the direction opposite to that in which the car was moving; the boy was first seen by and came into the view of the motorman when the rear of the wagon was within six feet of the front of the car; the motorman immediately applied all the means of stopping the car; the life guard or fender of the car went over the leg of and the front of the car was about two feet from the boy, who had fallen within the track space.

The facts do not support the verdict. Negligence on the part of the defendant cannot be predicated upon them. At the instant the boy first came into the sight of the motorman the danger of killing him was imminent. The defendant was bound to use every available agency or means, which did not within reasonable probability

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subject the passengers upon the car to serious bodily injury, to avoid killing or mangling him. As between the act of stopping the car suddenly before it ran upon him and thereby shaking, displacing or jerking the passengers and the act of stopping it gradually and carefully and therein permitting it to run upon him, the defendant was bound by the commands of ordinary and reasonable prudence and care, as well as by the dictates of the right regard for human life, to adopt the former. The stopping of the car and the means used to stop it were not more urgent or vigorous than the peril of the boy, when first visible to the motorman, warranted. The likelihood of injury to the passengers in their use was slight and to be disregarded in contrast with that of killing the boy by neglecting them. The sudden stopping of the car under the circumstances did not evince a disregard of the safety of the plaintiff or the other passengers. It was not only justified but praiseworthy.

Inasmuch as the entire evidence established the freedom of the defendant from negligence, we do not consider or determine whether or not the evidence in behalf of the plaintiff tended to prove negligence on the part of the defendant.

The judgments should be reversed and the complaint dismissed, with costs in all the courts.

HISCOCK, Ch. J., CHASE, CARDOZO, POUND, CRANE and ANDREWS, JJ., concur.

Judgments reversed, etc.

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CHARLES N. DOUGHERTY, an Infant, by SUSAN M. TEVES, His Guardian ad Litem, Respondent, *v.* EMMA L. SALT, as Executrix of HELLENA M. DOUGHERTY, Deceased, Appellant.

Promissory notes — decedent's estate — evidence — the words "value received" must give way to evidence that there was no consideration — erroneous direction of nonsuit — error to exclude evidence offered under general denial that decedent's signature was forged.

1. Where it appeared by the evidence produced for the plaintiff that a decedent made and gave the note in suit as a voluntary gift without consideration, the formula of the printed blank which contained the words "value received" becomes, in the light of the conceded facts, a mere erroneous conclusion which cannot overcome the conclusion of the law. (Neg. Inst. Law, § 54; Cons. L. ch. 38.)

2. Where the trial judge did not reserve his ruling on defendant's motion for a nonsuit or for the direction of a verdict, but denied the motion absolutely, it was error in setting aside a verdict for the plaintiff as contrary to law, to dismiss the complaint. A new trial should have been granted. (Code Civ. Pro. §§ 1185, 1187.)

3. Where in such an action the defendant denied the execution of the note by decedent, it was error for the trial court to exclude evidence offered under a general denial, to show that the signature to the note was forged.

Dougherty v. Salt, 184 App. Div. 910, reversed.

(Submitted October 21, 1919; decided November 18, 1919.)

APPEAL from a judgment entered June 20, 1918, upon an order of the Appellate Division of the Supreme Court in the second judicial department, which reversed a judgment in favor of defendant entered upon an order of the court at a Trial Term setting aside a verdict in favor of plaintiff and directing a dismissal of the complaint and reinstated said verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

Abraham Levitt and *Charles Oechler* for appellant. The plaintiff's own witnesses having shown by their testi-

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mony that the note was given without consideration except that of love and affection, it follows that no action will lie to enforce it. (*Kramer v. Kramer*, 181 N. Y. 477; *Blanshaw v. Russell*, 52 N. Y. Supp. 963; 161 N. Y. 629; *Harris v. Clark*, 3 N. Y. 93; *Holmes v. Roper*, 141 N. Y. 66.)

Walter B. Raymond and *Victor C. Cormier* for respondent. The verdict of the jury on the evidence was proper and in accordance with the law. (L. 1897, ch. 615, § 50; *Bringman v. Von Glahn*, 71 App. Div. 537; *Hegeman v. Moon*, 131 N. Y. 462; *Durland v. Durland*, 153 N. Y. 67; *Carnwright v. Gray*, 127 N. Y. 92; *Strickland v. Henry*, 175 N. Y. 372; *Hickok v. Bunting*, 67 App. Div. 560; *McCormack v. Williams*, 88 N. J. L. 170.)

CARDOZO, J. The plaintiff, a boy of eight years, received from his aunt, the defendant's testatrix, a promissory note for \$3,000 payable at her death or before. Use was made of a printed form, which contains the words "value received." How the note came to be given, was explained by the boy's guardian, who was a witness for his ward. The aunt was visiting her nephew. "When she saw Charley coming in, she said 'Isn't he a nice boy?' I answered her, yes, that he is getting along very nice, and getting along nice in school, and I showed where he had progressed in school, having good reports, and so forth, and she told me that she was going to take care of that child, that she loved him very much. I said, 'I know you do, Tillie, but your taking care of the child will be done probably like your brother and sister done, take it out in talk.' She said: 'I don't intend to take it out in talk, I would like to take care of him now.' I said, 'Well, that is up to you.' She said, 'Why can't I make out a note to him?' I said, 'You can, if you wish to.' She said, 'Would that be right?' And I said, 'I do not know, but I guess it would; I do not know why it would not.' And she said, 'Well, will

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you make out a note for me?' I said, 'Yes, if you wish me to,' and she said, 'Well, I wish you would.'" A blank was then produced, filled out, and signed. The aunt handed the note to her nephew with these words, "You have always done for me, and I have signed this note for you. Now, do not lose it. Some day it will be valuable."

The trial judge submitted to the jury the question whether there was any consideration for the promised payment. Afterwards, he set aside the verdict in favor of the plaintiff, and dismissed the complaint. The Appellate Division, by a divided court, reversed the judgment of dismissal, and reinstated the verdict on the ground that the note was sufficient evidence of consideration.

We reach a different conclusion. The inference of consideration to be drawn from the form of the note has been so overcome and rebutted as to leave no question for a jury. This is not a case where witnesses summoned by the defendant and friendly to the defendant's cause, supply the testimony in disproof of value (*Strickland v. Henry*, 175 N. Y. 372). This is a case where the testimony in disproof of value comes from the plaintiff's own witness, speaking at the plaintiff's instance. The transaction thus revealed admits of one interpretation, and one only. The note was the voluntary and unenforceable promise of an executory gift (*Harris v. Clark*, 3 N. Y. 93; *Holmes v. Roper*, 141 N. Y. 64, 66). This child of eight was not a creditor, nor dealt with as one. The aunt was not paying a debt. She was conferring a bounty (*Fink v. Cox*, 18 Johns. 145). The promise was neither offered nor accepted with any other purpose. "Nothing is consideration that is not regarded as such by both parties" (*Philpot v. Gruninger*, 14 Wall. 570, 577; *Fire Ins. Assn. v. Wickham*, 141 U. S. 564, 579; *Wisconsin & M. Ry. Co. v. Powers*, 191 U. S. 379, 386; *DeCicco v. Schweizer*, 221 N. Y. 431, 438). A note so given is not made for "value received," however its maker may have

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labeled it. The formula of the printed blank becomes, in the light of the conceded facts, a mere erroneous conclusion, which cannot overcome the inconsistent conclusion of the law (*Blanshan v. Russell*, 32 App. Div. 103; affd., on opinion below, 161 N. Y. 629; *Kramer v. Kramer*, 181 N. Y. 477; *Bruyn v. Russell*, 52 Hun, 17). The plaintiff, through his own witness, has explained the genesis of the promise, and consideration has been disproved (Neg. Instr. Law, sec. 54; Consol. Laws, chap. 43).

We hold, therefore, that the verdict of the jury was contrary to law, and that the trial judge was right in setting it aside. He went too far, however, in dismissing the complaint. He might have dismissed it if he had reserved his ruling on the defendant's motion for a nonsuit or for the direction of a verdict (Code Civ. Pro. secs. 1185, 1187). Instead of reserving his ruling, he denied the motion absolutely. Upon the return of the verdict, he should have granted a new trial.

A new trial was also necessary because of error in rejecting evidence. The defendant attempted to prove that the signature to the note was forged. The court refused to hear the evidence, because forgery had not been pleaded as a defense. The answer did deny the execution of the note. The evidence of forgery was admissible under the denial (*Schwarz v. Oppold*, 74 N. Y. 307; *Farmers' L. & T. Co. v. Siefke*, 144 N. Y. 354).

The judgment of the Appellate Division should be reversed, and the judgment of the Trial Term modified by granting a new trial, and as modified affirmed, with costs in all courts to abide the event.

HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CRANE and ANDREWS, JJ., concur.

Judgment accordingly.

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MATILDA HOYKENDORF, Appellant, *v.* BRADLEY CONTRACTING COMPANY, Respondent.

Negligence — question of fact — when new trial should be ordered.

In an action to recover for injuries from falling over a cleat nailed to a temporary flooring over a subway, the defendant produced as its only witness an employee who testified to a measurement of the cleat. The plaintiff called an inspector of a street railway company, who, with another witness, testified to his opinion as to the thickness of the cleat. Under these circumstances, this court is unable to accept as a verity the measurements which the defendant's employee testified that he made, and disregard the contradictory testimony and estimate of the inspector produced by the plaintiff. A question of fact as to the defendant's negligence was presented and a new trial should be ordered. (*Faber v. City of New York*, 213 N. Y. 411; *Casey v. City of New York*, 217 N. Y. 192, followed.)

Hoykendorf v. Bradley Contracting Co., 181 App. Div. 922, modified.

(Argued October 23, 1919; decided November 18, 1919.)

APPEAL from a judgment entered January 5, 1918, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiff entered upon a verdict directed by the court and directing a dismissal of the complaint in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant.

The facts, so far as material, are stated in the opinion.

David L. Podell and *Melville H. Cane* for appellant. The facts compel the reasonable inference that defendant was negligent. (*Derby v. D. M. Contracting Co.*, 112 App. Div. 234; 188 N. Y. 631; *Duer v. N. Y. C. & H. R. R. Co.*, 184 N. Y. 320; *Corr v. City of New York*, 121 App. Div. 578; *Kelly v. City of New York*, 197 N. Y. 543; 129 App. Div. 658; *Quirk v. Bradley Cont. Co.*,

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79 Misc. Rep. 368; *Wensley v. City of New York*, 173 App. Div. 248; *Faber v. City of New York*, 213 N. Y. 411; *Casey v. City of New York*, 217 N. Y. 192.)

Frederick L. C. Keating and *Israel V. Werbin* for respondent. The plaintiff has failed to prove actionable negligence on the part of the defendant. (*Lalor v. City of New York*, 208 N. Y. 434; *Derby v. D. M. Contracting Co.*, 112 App. Div. 334; 188 N. Y. 631; *Nolan v. King*, 97 N. Y. 565; *Nessler v. N. Y. Housewrecking Company*, 156 App. Div. 349; *Keating v. Metropolitan St. R. R. Co.*, 105 App. Div. 364; *Vanderborg v. New York City*, 158 App. Div. 297; *Beltz v. City of Yonkers*, 148 N. Y. 67; *Buller v. Village of Oxford*, 186 N. Y. 44.)

CHASE, J. On June 20, 1914, the plaintiff alighted from a west-bound Eighty-sixth street surface car in the city of New York and started in a diagonal course toward the sidewalk. The car had stopped just before reaching the crosswalk on Eighty-sixth street along the east side of Lexington avenue. When the plaintiff had walked one-third of the distance from the car to the sidewalk, and while looking to see if a wagon was coming, she stumbled against a cleat which was nailed to the temporary wooden flooring or roadway used by the defendant in connection with a new subway then under construction by it and fell receiving the injuries for which this action is brought.

The Appellate Division reversed the judgment obtained at the Trial Term, saying that the finding of negligence by the defendant "was clearly against the evidence," and dismissed the complaint. (*Hoykendorf v. Bradley Contracting Co.*, 181 App. Div. 922.)

The only witness produced by the defendant was a man in its employ as an investigator of claims. He in effect testified that it was not necessary to maintain a cleat more than two inches thick where the one in

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question was maintained. He testified that a cleat was necessary to cover an opening in the flooring where laborers had lowered ropes to hold cables, a part of the subsurface structures. He further testified that after the accident he measured the cleat and that it was one and one-half feet long, ten inches wide, and two inches thick and that it was bevelled on the four sides at an angle of forty-five degrees from the flooring to the top of the cleat. The plaintiff in her complaint alleged that the cleat was about two inches thick, but one of her witnesses who was an inspector employed by the railroad company and was on the front platform of the car at the time the plaintiff fell, testified that he observed the cleat and that it was about two feet long, eight inches wide and four inches thick and bevelled on one end. Another witness called by the plaintiff was at the time the plaintiff fell on the sidewalk a short distance from her. He testified that the cleat was one and one-half feet in length, less than a foot in width, and about two and one-half inches thick and bevelled on the edges.

The evidence in this case is not like the case of *Lalor v. City of New York* (208 N. Y. 431) where the plaintiff produced several witnesses, one of whom had made measurements which were accepted as entirely destroying the probative and evidentiary value of the estimates and conjectures of the other witnesses produced by her; or the case of *Terry v. Village of Perry* (199 N. Y. 79) where the measurements as given by one of the plaintiff's witnesses were so manifestly correct that they were accepted on appeal.

We are in this case unable to accept as a verity the measurements which the defendant's employee and witness testified that he made and disregard the testimony and estimate of the railroad inspector produced by the plaintiff (*Casey v. City of New York*, 217 N. Y. 192), even although it may seem that the inspector was mistaken in his estimate.

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In determining as to the weight of evidence the Appellate Division might disregard the estimate as to the thickness of the cleat made by the plaintiff's witnesses and accept the measurements of the defendant's witness, but this court cannot weigh the evidence. The dismissal of the complaint requires this court in the consideration of the case to take the view of the evidence most favorable to the plaintiff. (*Faber v. City of New York*, 213 N. Y. 411; *Melcher v. Ocean Accident & Guarantee Corp.*, 226 N. Y. 51; *Kraus v. Birnbaum*, 200 N. Y. 130.)

The cleat was placed about twelve to twenty-five feet west of the crosswalk on Eighty-sixth street along the east side of Lexington avenue. It was not in a place in the roadway where persons alighting from west-bound Eighty-sixth street surface cars would necessarily pass, but where as in the case of the plaintiff they would pass if they took a diagonal course to the sidewalk. In view of the place in the roadway where the cleat was nailed and the testimony of the defendant's employee and witness showing substantially that a two-inch cleat was all that was necessary to protect the hole made in the roadway, if it is true that a cleat four inches thick was there maintained bevelled only on one end, a question of fact was presented as to the defendant's negligence.

The judgment should be modified by striking out the part thereof dismissing the complaint and inserting in place thereof a direction for a new trial, and costs of this appeal are awarded to the plaintiff to abide the event.

HISCOCK, Ch. J., COLLIN, HOGAN, CARDOZO, CRANE and ANDREWS, JJ., concur.

Judgment accordingly.

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LEO ADAMS, an Infant, by MARCY E. ADAMS, His Guardian ad Litem, Respondent, *v.* GEORGE BULLOCK, as Receiver of the BUFFALO AND LAKE ERIE TRACTION COMPANY, Appellant.

Negligence — injury to boy who touched trolley wire with a piece of wire — defendant not liable in absence of any evidence that reasonable precautions had not been taken against injury from trolley wire.

The defendant runs a trolley line which is crossed by a bridge. The plaintiff, a boy of about twelve years of age, while crossing the bridge, in swinging a wire about eight feet long, brought it in contact with defendant's trolley wire which was between four and five feet below the top of the parapet of the bridge, which parapet was eighteen inches wide. By this contact the plaintiff was shocked and burned. *Held*, that there was no evidence that defendant had failed in its duty to adopt reasonable precautions against injury from the wire. Hence a recovery by plaintiff cannot be sustained.

Adams v. Bullock, 188 App. Div. 948, reversed.

(Argued October 23, 1919; decided November 18, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 15, 1919, affirming a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

Thomas R. Wheeler for appellant. The defendant was not guilty of negligence. The trial court erred in submitting the case to the jury. (*Freeman v. B. H. R. R. Co.*, 54 App. Div. 596; *Sheffield Co. v. Morton*, 161 Ala. 153; *Kempf v. S. & I. E. R. Co.*, 82 Wash. 263; *Johnston N. O. T. H. El. Co.*, 17 L. R. A. [N. S.] 435; *Mayfield W. & L. Co. v. Webb*, 33 Ky. L. 909; *Graves v. Washington Water Power Co.*, 44 Wash. 675.)

Murle L. Rowe and *Nelson J. Palmer* for respondent. The negligence of the defendant was a question of fact

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for the jury to determine. (*Hickok v. A. L., H. & P. Co.*, 200 N. Y. 465; *Webster v. Richmond Light & R. R. Co.*, 158 App. Div. 210; *Braun v. Buffalo General Electrical Co.*, 200 N. Y. 484, 492; *Caglione v. Mount Morris Electric Light*, 56 App. Div. 191; *Paine v. Electric Illuminating, etc., Co.*, 64 App. Div. 477; *Wagner v. Brooklyn Heights R. R. Co.*, 69 App. Div. 349; 174 N. Y. 520; *Morhard v. Richmond Light & R. R. Co.*, 111 App. Div. 353.) The defendant was negligent because it maintained a wire carrying a high and dangerous voltage of electricity, unguarded in any manner, at a point in dangerous proximity to a place frequented by pedestrians and used by children as a playground. (*Braun v. Buffalo General Electrical Co.*, 200 N. Y. 484; *Wilson v. American Bridge Co.*, 74 App. Div. 596; *Wittleder v. Electric Co.*, 47 App. Div. 410; 50 App. Div. 478; 219 N. Y. 443; *Travell v. Bannerman*, 71 App. Div. 439; 174 N. Y. 49; *Robertson v. Lighting & Power Co.*, 178 App. Div. 720.)

CARDENZO, J. The defendant runs a trolley line in the city of Dunkirk, employing the overhead wire system. At one point, the road is crossed by a bridge or culvert which carries the tracks of the Nickle Plate and Pennsylvania railroads. Pedestrians often use the bridge as a short cut between streets, and children play on it. On April 21, 1916, the plaintiff, a boy of twelve years, came across the bridge, swinging a wire about eight feet long. In swinging it, he brought it in contact with the defendant's trolley wire, which ran beneath the structure. The side of the bridge was protected by a parapet eighteen inches wide. Four feet seven and three-fourths inches below the top of the parapet, the trolley wire was strung. The plaintiff was shocked and burned when the wires came together. He had a verdict at Trial Term, which has been affirmed at the Appellate Division by a divided court.

We think the verdict cannot stand. The defendant in using an overhead trolley was in the lawful exercise of its

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franchise. Negligence, therefore, cannot be imputed to it because it used that system and not another (*Dumphy v. Montreal L. H. & P. Co.*, 1907 A. C. 454). There was, of course, a duty to adopt all reasonable precautions to minimize the resulting perils. We think there is no evidence that this duty was ignored. The trolley wire was so placed that no one standing on the bridge or even bending over the parapet could reach it. Only some extraordinary casualty, not fairly within the area of ordinary prevision, could make it a thing of danger. Reasonable care in the use of a destructive agency imports a high degree of vigilance (*Nelson v. Bransford L. & W. Co.*, 75 Conn. 548, 551; *Braun v. Buffalo Gen. El. Co.*, 200 N. Y. 484). But no vigilance, however alert, unless fortified by the gift of prophecy, could have predicted the point upon the route where such an accident would occur. It might with equal reason have been expected anywhere else. At any point upon the route, a mischievous or thoughtless boy might touch the wire with a metal pole, or fling another wire across it (*Green v. W. P. Rys. Co.*, 246 Penn. St. 340). If unable to reach it from the walk, he might stand upon a wagon or climb upon a tree. No special danger at this bridge warned the defendant that there was need of special measures of precaution. No like accident had occurred before. No custom had been disregarded. We think that ordinary caution did not involve forethought of this extraordinary peril. It has been so ruled in like circumstances by courts in other jurisdictions (*Green v. W. P. Rys. Co.*, *supra*; *Vannatta v. Lancaster L. & P. Co.*, 164 Wis. 344; *Parker v. Charlotte Elec. Ry. Co.*, 169 N. C. 68; *Kempf v. S. & I. E. R. R. Co.*, 82 Wash. 263; *Sheffield Co. v. Morton*, 161 Ala. 153). Nothing to the contrary was held in *Braun v. Buffalo Gen. El. Co.* (200 N. Y. 484) or *Wittleder v. Citizens Electric Ill. Co.* (47 App. Div. 410). In those cases, the accidents were well within the range of prudent foresight (*Braun v. Buffalo Gen. El. Co.*, *supra*, at p.

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494). That was also the basis of the ruling in *Nelson v. Branford Lighting & Water Co.* (75 Conn. 548, 551). There is, we may add, a distinction, not to be ignored, between electric light and trolley wires. The distinction is that the former may be insulated. Chance of harm, though remote, may betoken negligence, if needless. Facility of protection may impose a duty to protect. With trolley wires, the case is different. Insulation is impossible. Guards here and there are of little value. To avert the possibility of this accident and others like it at one point or another on the route, the defendant must have abandoned the overhead system, and put the wires underground. Neither its power nor its duty to make the change is shown. To hold it liable upon the facts exhibited in this record would be to charge it as an insurer.

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The judgment should be reversed and a new trial granted, with costs to abide the event.

HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CRANE and ANDREWS, JJ., concur.

Judgments reversed, etc.

PERCIVAL WILDS, as Trustee in Bankruptcy of MID-TOWN CONTRACTING COMPANY, Appellant, v. THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, Respondent.

Building contract — bankruptcy — provision that if contractor abandoned work before completion, building material on property could be used by owner in completion of work and as part payment of contractor's obligation — when upon contractor's failure to complete work, owner took possession of materials, a trustee in bankruptcy for contractors thereafter appointed cannot recover value of such materials.

A contractor undertook to erect a building for defendant and stipulated that if for any reason he could not perform, and gave up the work, the building material on the property could be used by

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the owner in carrying out the contract. The contractor entered on the work but, having failed to perform, and abandoned it, the defendant took possession of such material as it found on the work for the purpose of using it in its completion, the cost of which was in excess of the value of the property so taken. Thereafter a petition in involuntary bankruptcy was filed against the contractor, and plaintiff elected trustee in bankruptcy. This action was brought by him to recover the property. *Held*, that the possession taken by the defendant was within the terms of its contract and did not constitute a conversion. Hence, plaintiff cannot recover. (*Titusville Iron Co. v. City of New York*, 207 N. Y. 203; *Zartman v. First National Bank of Waterloo*, 189 N. Y. 267; *Stephens v. Perrine*, 143 N. Y. 476, distinguished.)

Wilds v. Board of Education, 186 App. Div. 472, affirmed.

(Argued October 22, 1919; decided November 18, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 26, 1919, affirming a judgment in favor of defendant entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

Irving L. Ernst for appellant. The attempted lien or title conferred by the bankrupt on the defendant is invalid because the bankrupt could not pledge subsequently acquired property as against its creditors. (*Titusville Iron Co. v. City of New York*, 207 N. Y. 203; *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570; *Zartman v. National Bank of Waterloo*, 189 N. Y. 267; *Matter of Midtown Contracting Co.*, 238 Fed. Rep. 871; *Stephens v. Perrine*, 143 N. Y. 476.)

William P. Burr, Corporation Counsel (*John F. O'Brien* and *Joseph L. Pascal* of counsel), for respondent. Under its contract with the Midtown Contracting Company, upon the abandonment of the work by that concern, the board of education acquired a good title to the building materials on the line of the work and had the right to

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use the same and the plant and equipment in the completion of the building. This title had vested in the board of education prior to the institution of bankruptcy proceedings against the contractor. (*Sexton v. Kessler*, 225 U. S. 90; *Matter of Shelby*, 235 Fed. Rep. 311; 242 Fed. Rep. 251; *N. F. H. P. & Mfg. Co. v. Schermerhorn*, 132 App. Div. 442; *Perkins v. Batterson*, 66 Hun, 583; *Tinker & Scott v. U. S. Fidelity & Guaranty Co.*, 169 Fed. Rep. 211; *Hurley v. A., T. & S. F. Ry. Co.*, 213 U. S. 126.) Assuming, for the sake of argument, that clause (Q) of the contract is in the nature of a chattel mortgage on subsequently acquired property, the board of education, having taken possession of the building materials and equipment before the petition in bankruptcy was filed against the contractor, under a provision of a valid contract, giving the board the right to use the same in the completion of the building, acquired a good title to said property, even as against the trustee in bankruptcy of the contractor. (*Chapman v. Weimer*, 4 Ohio St. 481; *Moody v. Wright*, 13 Metc. 17; *Mitchell v. Winslow*, 2 Story, 630; *Tennis v. Midkiff*, 55 Ill. App. 642; *Chase v. Denny*, 130 Mass. 566; *Leech v. Arkansas City Mfg. Co.*, 8 Kan. App. 621; *McLoud v. Wakefield*, 70 Vt. 558; *Peabody v. Landon*, 61 Vt. 318; *Thompson v. Fairbanks*, 196 U. S. 516; Jones on Chattel Mortgages, § 178; *Martin v. Holloway*, 16 Ida. 513; 25 L. R. A., N. S., 110; *Cameron v. Marvin*, 26 Kan. 612; *Dobyns v. Meyer*, 95 Mo. 132; 6 Am. St. Rep. 32; *Koppelman Furniture Co. v. Fricke*, 39 Mo. App. 146; *Blakeslee v. Rossman*, 43 Wis. 116.)

CRANE, J. The Midtown Contracting Company on October 13th, 1914, entered into a contract with the board of education of the city of New York for the construction of the Evander Childs High School in the borough of The Bronx. The price was \$414,141. The contract contained the following provision:

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“ (Q) If the work to be done under this contract shall be abandoned by the Contractor, or if this contract shall be assigned, or the work sublet by him, otherwise than as herein specified, or if the Contractor shall at any time refuse or neglect to supply a sufficiency of workmen and materials of the proper skill and quality, or shall fail in any respect to prosecute the work required by this contract with promptness and diligence, or shall omit to fulfill any provisions herein contained, or if at any time the Superintendent of School Buildings shall be of the opinion, and shall so certify in writing to the Committee on Buildings, that the performance of the contract is unnecessarily or unreasonably delayed, or that the Contractor is wilfully violating any of the conditions or covenants of this contract or specifications, or is executing the same in bad faith or not in accordance with the terms thereof, or if the work be not fully completed within the time named in the contract for its completion, the Committee on Buildings shall notify the Contractor to discontinue all work, or any part thereof, under this contract, by a written notice, signed on behalf of said Committee by its Chairman or Acting Chairman, to be served upon the Contractor, whether personally or by leaving said notice at his place of residence or business, or with his agent in charge of the work, or with any employee found on the work, or by notice, letter or other communication addressed to the Contractor deposited in a postpaid wrapper in any postoffice box regularly maintained by the postoffice, and thereupon the Contractor shall discontinue the work or such part thereof, and the Board of Education shall thereupon have the power to contract for the completion of the contract in the manner prescribed by law, or to place such and so many persons as it may deem advisable, by contract or otherwise, to work at and complete the work herein described, or such part thereof, and to use such materials as he may find upon the line of the work

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and to procure other material for the completion, so as to fully execute the same in every respect, and the cost and expense thereof at the reasonable market rates shall be a charge against the Contractor, who shall pay to the party of the first part the excess thereof, if any, over and above the unpaid balance of the amount to be paid under this contract; and the Contractor shall have no claim or demand to such unpaid balance, or by reason of the non-payment thereof to him, and shall forfeit all claim to any moneys retained; and no molds, models, centers, scaffolding, planks, horses, derricks, tackle, implements, power plants or building material of any kind belonging to or used by the Contractor shall be removed as long as the same may be wanted for the work. In case the Contractor shall at any time in the opinion of the Superintendent, neglect to faithfully carry on and perform any portion of the work required by this contract, whereby safety and proper construction may be endangered or which may not be subsequently rectified, or whereby damage and inquiry may result to life and property, or either; then, and in every such case, the Superintendent shall have the right forthwith and without notice to the Contractor to enter into and upon the work, and to make good any and all imperfect work and material and deficiencies arising by reason of such neglect; the expense and cost thereof shall be a charge against the Contractor, to be deducted from any payment or moneys which may be due or subsequently become due under this contract, and the opinion and decision of the Superintendent of School Buildings in all instances which may arise in the manner aforesaid shall be final, conclusive and binding upon the Contractor. But no action so taken by the Superintendent of School Buildings shall release the Contractor from any and all consequences and damages which may have arisen, or may arise, owing to such neglect, whether willful or by omission; and the Contractor covenants and agrees to hold

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the party of the first part harmless against and from any and all suits at law and all and every damages and loss whatsoever arising therefrom. Should the Contractor fail to complete the contract he shall forfeit all claim for compensation."

The company commenced work but failed to perform its contract and in the month of July, 1916, abandoned the work. On August 11th, 1916, the defendant took possession of such building materials, plan and equipment belonging to the Midtown Contracting Company as it found on the line of work for the purpose of using the same in the completion of the work and as provided in said clause "Q." The excess cost to the defendant to complete the work in accordance with the provisions of the contract referred to was \$60,330.39, no part of which has been paid to the defendant.

Four days after the defendant took possession of the materials as stated and on August 15th, 1916, a petition for the involuntary bankruptcy of the Midtown Contracting Company was duly filed in the office of the clerk in the United States District Court for the Southern District of New York, and thereafter the plaintiff was elected trustee in bankruptcy of the said company and duly qualified.

This action has been brought to recover the property taken by the defendant which by stipulation is valued at \$7,000.

The sole question presented for review is whether the clause "Q" of the contract and the possession by the defendant four days before the bankruptcy proceedings gives to the defendant title to the property as against the trustee in bankruptcy.

The contract appears to be an arrangement whereby a contractor undertook to erect a building and stipulated that if for any reason he could not perform and gave up the work that the building material upon the property could be used by the owner in carrying out the contract

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and as part payment in the reduction of the contractor's obligation. He agreed to do the work and furnish the material and would be liable in case of failure for the excess cost of completion. In this case the excess cost was over \$60,000. The use of the material upon the line of work by the owner was a reduction of the liability and lessened the excess cost. I do not see why such a contract has been referred to as one creating a lien upon future property or a contract in the nature of a chattel mortgage upon subsequently acquired property. It is rather an agreement for part payment and when possession is taken and the application made it is a payment and not a lien or an attempt to create a lien. The question of preference among creditors under the Bankruptcy Law does not enter into this case. This was the understanding of such a contract in *Duplan Silk Company v. Spencer* (115 Fed. Rep. 689) and in *Matter of Shelly* (235 Fed. Rep. 311).

Do the authorities force us to any other conclusion regarding the nature of this contract? The judges below have differed regarding the effect of the *Titusville* case (*Titusville Iron Co. v. City of New York*, 207 N. Y. 203).

The contract there is the same as here except that it was for the furnishing and installing of a heating and ventilating apparatus in a public school. The all important difference between the two cases is, however, the time of possession. In the *Titusville* case the bankruptcy proceedings were commenced on the 18th of June and possession by the board of education taken thereafter and on the 27th day of June. It was held that the clause of the contract which was the same as that above quoted in this case did not and could not create a lien upon future acquired property, and that the trustee in bankruptcy having been appointed before possession under that clause was taken by the city of New York, the rights of creditors had intervened and the city acquired no title. It will be noticed that the nature of

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this contract was not discussed. The opinion does not say that it was in the nature of a chattel mortgage or was an attempt to create a lien. It simply holds that such a contract could not operate as a chattel mortgage or as a lien upon property thereafter acquired so as to give property rights. The case does not hold that if possession had been taken under the contract and in accordance with its terms before bankruptcy proceedings had been commenced that such possession would not have been an application of the property to the obligations of the contractor. The endeavor in that case was to establish the city's rights to the property irrespective of possession and by reason of the agreement.

In the present case we have possession taken before bankruptcy proceedings and a use of the property to reduce the contractor's liability. It is not a lien but an application in the nature of a payment. In the *Titusville* case Chief Judge CULLEN in writing said: "The title of the contractor passed to the receiver in bankruptcy before the forfeiture authorized by the contract had accrued or the defendant taken possession," etc. (p. 210.) This clearly intimated that possession prior to the bankruptcy proceedings would or might have changed the result. As I read the *Titusville* case it does not pass upon the nature of the contract nor hold that possession taken before bankruptcy proceedings may not be considered as an application of the property to reduce the liability of the contractor.

Where would the limit be placed upon action by a trustee if possession under a contract like this can create no right as against subsequent proceedings in bankruptcy? In this case the proceeding was only four days after the board of education had taken possession of the property. Suppose it had been a year after all the material had been used in the public school and the \$60,000 excess charge created against the contractor. Would an action for conversion then lie by the trustee against the board

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for the use of the property? The question, I think, forcibly suggests that the *Titusville* case does not go to the extent of holding that possession prior to bankruptcy proceedings is an immaterial fact.

We must read the *Titusville* case in the light of the facts presented to the court at that time.

If, therefore, this contract may be any other than an agreement in the nature of a chattel mortgage or lien upon after-acquired property the *Titusville* case, *Zartman v. First National Bank of Waterloo* (189 N. Y. 267) and *Stephens v. Perrine* (143 N. Y. 476) are not applicable.

Matter of P. J. Sullivan Co. (254 Fed. Rep. 660), to which we have been referred, was decided upon facts essentially different from those in this case.

For the reasons stated the judgment appealed from should be affirmed, with costs.

HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO and ANDREWS, JJ., concur.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK ex rel.
JOHN F. HYLAN, as Mayor of the City of New York,
et al., Appellants, v. THOMAS E. FINEGAN, as Acting
Commissioner of Education of the State of New York,
Respondent.

State department of education — New York (city of) — school moneys appropriated by state and apportioned to New York city — controversy whether such moneys may be used in reduction of taxes or be placed to credit of board of education — writ of prohibition — state commissioner of education has no authority to decide such controversy — when writ of prohibition should be granted.

1. The commissioner of education, by virtue of section 890 of the Education Law (Cons. Laws, ch. 16), has the power of deciding controversies arising from the action or failure of action of bodies or individuals generally, or, for the time being, made agencies of the education department which are subject to the undisputed authority

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of the Education Law and bound to obey its commands. The subdivisions of section 890 enumerate bodies and officials recognizing the binding effect of the Education Law, standing as agents under and of it but differing in respect of its meaning and application or refusing to abide by it. The legislature has thus conferred upon the commissioner broad but limited powers to enforce the Education Law.

2. The appellants are seeking to restrain by writ of prohibition the commissioner from entertaining jurisdiction and making determination of a controversy which has arisen between the municipal authorities of the city of New York and the board of education of that city concerning the disposition of school moneys appropriated to that city by the state. It is the claim in behalf of the city that under section 1102 of its charter these moneys may be credited to the "general fund for the reduction of taxes" as a reimbursement in part for moneys raised by taxation for school purposes. The board of education claims that said charter provision was impliedly repealed by chapter 786 of the Laws of 1917, and that such moneys should be by the municipal authorities placed to its credit. A proceeding was instituted by the commissioner of education for the purpose of making a quasi-judicial and final determination of this question. The city does not admit that it stands in the position of an agency of the education department nor that the provisions of the Education Law are applicable to the moneys which have been paid over to it, but denies these propositions and insists that under the statutes which constitute its charter it is entitled to hold the moneys which have been paid to it and apply them for the benefit of its taxpayers. Thus its claim is in hostility to the Education Law. Held, that the claim by the commissioner of the right to entertain jurisdiction of, and decide, such a controversy cannot be sustained, and that a writ of prohibition should be granted. (Education Law, §§ 96, 890 (Cons. L. ch. 16); Charter City of New York, § 1102; L. 1917, ch. 786.) (*People ex rel. Board of Education v. Finley*, 211 N. Y. 51; *Bullock v. Cooley* 225 N. Y. 566, distinguished.)

People ex rel. Hylan v. Finegan, 187 App. Div. 737, reversed.

(Argued October 1, 1919; decided November 18, 1919.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered June 18, 1919, which affirmed an order of Special Term denying a motion for a writ of prohibition.

The facts, so far as material, are stated in the opinion.

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William P. Burr, Corporation Counsel (William E. C. Mayer, George P. Nicholson and John F. O'Brien of counsel), for appellants. The state commissioner of education is without jurisdiction to cite the municipal authorities of the city of New York before him on the petition of the superintendent of schools for the purpose of arriving at a determination as to the proper and lawful disposition of public school moneys apportioned by the state to the city of New York, when, in so doing, he seeks to make a final and conclusive determination, binding on such authorities, as to whether or not section 1102 of the Greater New York charter is repealed by implication by the act, Laws of 1917, chapter 786. In attempting so to do he is acting in excess of the jurisdiction conferred on him by the Education Law. (*Bullock v. Cooley*, 225 N. Y. 566; *People ex rel. Bd. of Education v. Finley*, 211 N. Y. 51; *People ex rel. Light v. Skinner*, 159 N. Y. 162; *Ramsay v. Hayes*, 187 N. Y. 367.)

Charles D. Newton, Attorney-General (Frank B. Gilbert of counsel), for respondent. The commissioner of education has administrative control over the apportionment and disposition of moneys appropriated by the legislature for the support of common schools and has jurisdiction to examine into and determine controversies as to the disposition of such moneys. (*Gunnison v. Board of Education*, 176 N. Y. 11; *Ham v. Mayor*, 70 N. Y. 459; *Dannat v. Mayor*, 6 Hun, 88; 66 N. Y. 585; *People ex rel. Board of Education v. Draper*, 78 Misc. Rep. 329; 211 N. Y. 51; *Hutchinson v. Skinner*, 21 Misc. Rep. 729; *Matter of Hirshfield*, 177 N. Y. Supp. 363.) The petition of the city superintendent properly presented to the commissioner the question as to the disposition to be made of the public school moneys apportioned to the city of New York, and the commissioner is authorized to entertain such petition and investigate as to the

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matters set forth therein. (*People ex rel. Bd. of Education v. Finley*, 211 N. Y. 51; *Matter of Harris*, 58 Misc. Rep. 297.)

HISCOCK, Ch. J. The appellants are seeking to restrain by writ of prohibition the commissioner of education of the state from entertaining jurisdiction and making determination of a controversy which has arisen between the municipal authorities of the city of New York and the board of education of that city concerning the disposition of school moneys appropriated to that city by the state. It is the claim in behalf of the city that under section 1102 of its charter these moneys may be credited to the "general fund for the reduction of taxes" as a reimbursement in part for moneys raised by taxation for school purposes. The board of education, on the other hand, claims that said charter provision was impliedly repealed by chapter 786 of the Laws of 1917, and that such moneys should be by the municipal authorities placed to its credit. Without going into further detail and without considering its merits, it is sufficient to state for the purposes of this discussion that the controversy involves a real question which may be debated seriously and in good faith and that the claim of the city has no appearance of a sham or pretense.

Claiming to act under the provisions of the Education Law the superintendent of schools of the school district of New York presented to the respondent as commissioner of education a long communication setting forth in much greater detail than has been necessary here, the nature and history of the controversy which has been referred to and which concluded with the submission to the commissioner for answer of the question which was involved and with the request "that prompt action be taken by the State Department of Education looking to the restoration to this School District of such moneys as may have been diverted therefrom and that

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such other relief may be afforded as is contemplated by law and necessary in the premises."

In response to this petition the commissioner caused to be served upon the municipal authorities of New York city a notice to the effect that a hearing would be had before him at his office at a specified time "for the purpose of arriving at a *determination* as to the proper and lawful disposition of public moneys apportioned to the City of New York under and pursuant to the provisions of the Education Law."

This notice construed in the added light, if that be necessary, shed by the attitude of the commissioner of education in this proceeding, makes it perfectly plain that he claimed jurisdiction and proposed to make a *determination* of the controversy which, under the provisions of a statute hereinafter to be discussed, would be binding upon the city and subject to no review.

There then was and still is a provision of the Education Law [Cons. Laws, ch. 16] (§ 96) which gives the commissioner of education power "to cause to be instituted such proceedings or processes as may be necessary to properly enforce and give effect to any provision * * * pertaining to the school system of the State," and it is true that the notice served upon appellants did contain reference to this section. But consideration of the entire notice and of the argument upon this appeal shows beyond the possibility of gainsaying it that the commissioner was not proceeding under that section but was proposing as a tribunal of last resort subject to no review to decide whether the charter provision had been repealed and who, therefore, was entitled to the large fund in dispute. And the question presented by the application for the writ of prohibition is the one whether he has such power.

It is claimed in his behalf that the jurisdiction and authority are found in the provisions of section 890 (formerly 880) of the Education Law which enacts that

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"any person conceiving himself aggrieved may appeal or petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this act and his decision in such appeals, petitions or proceedings shall be final and conclusive, and not subject to question or review in any place or court whatever. Such appeal or petition may be made in consequence of any action" by certain specified individuals, officials and agencies. In our opinion an interpretation of this section holding that it is broad enough to confer upon the commissioner of education jurisdiction to make a final and conclusive decision of the present controversy, would be not only unjustifiable but extravagant and somewhat startling.

The education department of the state is a great department. Its organization extends in many directions, embraces many activities and employs manifold agencies. The commissioner of education is, by statute, made its executive director and charged with the general duty of overseeing its administration. It, of course, was and is inevitable that constant controversies should arise in the administration of this system. And so for many years it has been deemed a wise policy to confer upon the commissioner of education the jurisdiction and power summarily to decide such controversies. This policy now largely finds expression in the provisions of section 890 which is claimed as the authority for the proposed action of the commissioner. That section undoubtedly does confer upon the commissioner an extended quasi-judicial power to determine controversies. But it seems to us that its provisions show a very distinct limitation upon this power. It gives the commissioner power of deciding controversies arising from the action or failure of action of bodies or individuals generally or, for the time being, made agencies of the education department and

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which are subject to the undisputed authority of the Education Law and bound to obey its commands. The powers and limitations alike conferred and existing under this section are made plain by a consideration of its subdivisions specifying the bodies or persons whose action may be reviewed and passed on by the commissioner. As illustrative of other subdivisions we find specified as those whose actions may be reviewed, school district meetings, school commissioners and other officers acting or refusing to act in the formation of a school district, officials refusing to pay over school moneys, etc. The last subdivision of the section which deals in general language is, of course, to be construed in the light of its relation to the other subdivisions of the section and so construed is not any broader in the ultimate test than they. It is seen at once that these subdivisions enumerate bodies and officials recognizing the binding effect of the Education Law, standing as agents under and of it but differing in respect of its meaning and application or refusing to abide by it.

As this court has held, the legislature under such circumstances has wisely conferred upon the commissioner of education broad but nevertheless limited powers to enforce the provisions of the Education Law and by summary decision to settle disputes arising in the administration of our school system. (*People ex rel. Board of Education, N. Y., v. Finley*, 211 N. Y. 51; *Bullock v. Cooley*, 225 N. Y. 566.) But such cases as those are entirely different than the present one. As we have said, the city of New York does not admit in this matter that it stands in the position of an agency of the education department and does not admit that the provisions of the Education Law are applicable to the moneys which have been paid over to it. On the contrary, it denies and repudiates these propositions and insists that it stands as a municipality under the statutes which constitute its charter entitled

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to hold the moneys which have been paid to it and apply them for the benefit of its taxpayers. It does not claim under the Education Law. It claims in hostility to it and defies its commands. It seems to us so clear that determination of such a controversy is not and ought not to be within the jurisdiction of the commissioner of education that the proposition cannot be clarified by extended discussion. If the proposition of the commissioner of education is correct then he would have a power to settle controversies between bodies within the department of education and third parties outside of its jurisdiction involving large property rights which, because of the finality of his decision, would be more far reaching than that possessed by the Supreme Court of the state.

It is, however, suggested that while the commissioner has not the power fully and finally to determine the controversy which has arisen, he should be permitted to institute and conduct proceedings before himself, if upon examination we should conclude that section 1102 of the charter has been repealed by the provisions of the Education Law. This suggestion is supposed to be in accordance with those authorities which hold that while a court of limited powers cannot acquire jurisdiction by incorrectly deciding facts sustaining the same, nevertheless if the facts do actually give it jurisdiction it may proceed. In my opinion that argument and suggestion are entirely inapplicable to the present case.

If we should assume that the commissioner of education under some proper authority had been enabled to institute and had instituted proceedings before himself to compel the municipal authorities to credit the moneys received from the state to the board of education, it doubtless would be proper on an attempt to stay those proceedings to determine whether they should be thus credited and not stay the proceedings if they should be. That, however, is not at all the situation. As has been stated, the proceeding was instituted by the com-

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missioner of education for the purpose of making a quasi-judicial and final *determination* of the question whether the city of New York in its tax fund or the board of education by credit to it was entitled to several millions of dollars received from the state. Section 890 authorizes the final and controlling determination by the commissioner of certain matters and he claims that this controversy is one of them. He has not instituted this proceeding for the purpose of enforcing a conceded or established right but for the purpose of determining what are the rights of the contending parties. In his argument he does not shun any of the consequences of this position. His counsel expresses himself as being grateful for the opinion and advice "volunteered" by the court below in respect of the merits of the case. "He is entirely willing that this court upon the determination of this appeal should express its views as to the implied repeal of * * * section 1102" of the New York charter and states that the commissioner would be largely influenced by the expression of its views. But in the end with entire confidence and clearness as defining his position it is said that "whatever may be said by this court * * * the commissioner must under the statute be permitted to make a *determination* of the questions presented to him * * * in due form as is provided by law."

Thus the question is one of initial jurisdiction to entertain and determine this controversy and it is too well settled to require amplification that the question of jurisdiction is not to be decided by a conjecture as to the method in which it will be exercised. If the commissioner has jurisdiction to entertain and determine this controversy then he has the power to finally decide that section 1102 of the charter has not been repealed and that these moneys should not be credited to the board of education, although this court might hold the contrary view, and *vice versa*. It is not a case where we can hold

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that he is entitled to enforce a right which we might think exists, but a case where jurisdiction is claimed to determine a controversy in any way that shall seem proper to the judicial mind of the commissioner. That we do not think he has power to do.

These views lead us to the conclusion that the orders of the Appellate Division and of the Special Term should be reversed, with costs in all courts, and the application for the writ of prohibition granted, with costs.

CHASE, CARDZOZO, POUND, McLAUGHLIN and ANDREWS, JJ., concur; HOGAN, J., absent.

Orders reversed, etc.

A. WELLINGTON PECK et al., as Executors of ALBERT PECK, Deceased, Respondents, *v.* MARY C. SMITH, Appellant.

Will — bequest and devise to beneficiary to use such part of principal as she might deem necessary and with power to sell real estate and use proceeds thereof — executors cannot maintain action to recover moneys left at death of testator's widow — right to action accrued to residuary legatees.

When testator bequeathed to his wife the use of a certain sum of money for life "with the right and privilege to use such part or portion of the principal thereof as to her shall seem meet and proper," and also devised to her for life the use, rents and income of certain real estate with the right and privilege of selling the same, should she deem it necessary, and further provided that if there should be any part of the sum bequeathed to his wife and the said real estate or the proceeds thereof left at the time of her death, such moneys and said real estate or its equivalent should be divided among certain legatees, the executors of testator who in accordance with his will had turned over to his widow, absolutely and without reservation the moneys bequeathed, and real estate devised, to her, cannot maintain an action to recover certain bonds and mortgages constituting part of the fund bequeathed to the widow which she had transferred to another. After the delivery of the fund to testator's widow, the executors had no further control over or right to the fund. When testator's widow

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died whatever portion of the fund remained belonged to the legatees named in his will and hence whatever right of action there was accrued to such legatees.

Peck v. Smith, 183 App. Div. 336, reversed.

(Argued October 21, 1919; decided November 18, 1919.)

APPEAL from a judgment entered May 20, 1918, upon an order of the Appellate Division of the Supreme Court in the third judicial department, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term without a jury and directing judgment in favor of plaintiffs.

The nature of the action and the facts, so far as material, are stated in the opinion.

Frank Talbot and *William W. Wemple* for appellant. The action must be brought by the remaindermen and cannot be maintained by the executors. (*Leggett v. Stevens*, 185 N. Y. 70; *Smith v. Van Ostrand*, 64 N. Y. 278; *Spencer v. Strait*, 38 Hun, 228; 40 Hun, 463; *Matter of Comer*, 72 Misc. Rep. 321; *Seward v. Davis*, 198 N. Y. 415; *Shea v. Campbell*, 71 Misc. Rep. 222.)

Horatio D. Wright for respondents. This action is properly brought in the name of the executors. (*Munnally v. Robinson*, 113 App. Div. 848.)

CRANE, J. This action is brought by A. Wellington Peck and John Francis Peck, as executors of the last will and testament of Albert Peck, deceased, against Mary C. Smith, to recover the possession of two bonds and mortgages valued respectively at \$1,000 and \$3,500. The right of the plaintiffs is based upon the provisions of the will of Albert Peck who died July 2, 1911, in the county of Fulton, New York.

His will was as follows so far as relates to this litigation.

"Second. I give and bequeath to my wife, Grace A. Peck, the use of the sum of twenty thousand dollars, for and during the term of her natural life, with the right

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and privilege to use such part or portion of the principal thereof as to her shall seem meet and proper.

"*Third.* I give, devise and bequeath to my wife, Grace A. Peck, for and during the term of her natural life, the use, rents and income of the house, lot and premises owned by me, situate on the west side of North Perry Street, in the City of Johnstown, New York, known as the Johnson property, with the right and privilege of selling the same if at any time she should deem it necessary, and the right and privilege to use such part or portion of the proceeds of the sale of said house as to her shall seem meet and proper; and a conveyance by her of said house and lot to any person shall be deemed to be an exercise of the right herein conferred upon her to sell and convey the same, and her conveyance thereof shall be valid and effectual forever. If, at the time of the death of my wife, Grace A. Peck, there shall be left any part or portion of the sum of twenty thousand dollars given and bequeathed to my said wife in paragraph Second of my said will and the house and lot situated on North Perry Street, or the proceeds thereof mentioned in paragraph Third of my said will, then I give, devise and bequeath said sums, and the said house and lot, or the proceeds thereof, to such of the legatees mentioned in this will as shall be living at the time of my death, and whose names are mentioned in paragraph Twenty-fifth of my said will; said moneys and said house and lot, or its equivalent, to be divided among such legatees in equal shares, each person named in said Twenty-fifth paragraph to take one of said equal shares."

There were seventeen persons named in the twenty-fifth paragraph as entitled to all the rest, residue and remainder of the testator's property both real and personal. The will did not in terms appoint trustees but did name executors in the following language: "I make, constitute and appoint my wife, Grace A. Peck, and my nephews, Wellington Peck and John Francis

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Peck, to be executrix and executors of this my last Will and Testament hereby revoking all former Wills by me made."

The \$20,000 referred to was paid to the widow, Grace A. Peck, no bond or undertaking being demanded or taken by the executors for the return or preservation of any part thereof for the remaindermen. On the 15th day of November, 1912, in the Surrogate's Court of Fulton county, the executors finally and judicially settled their accounts.

The bonds and mortgages for which this action was brought are part of this fund of \$20,000 paid to the widow.

Grace A. Peck, after the death of her husband, went to live with her sister, Mrs. Alice E. Bradley, in San Francisco, California, where she remained until the time of her death, February 21st, 1915. By assignments properly executed on September 22d, 1911, Grace A. Peck conveyed to her sister, Alice E. Bradley, the two bonds and mortgages in question, the trial court finding that she received in return an agreement from her sister to support and maintain her during life. The trial court also found that by the will of Albert Peck his widow had an absolute power of disposition, irrespective of her needs, and could make a valid gift of these bonds and mortgages or any part of the \$20,000 to her sister. The defendant, in this case, is merely the holder of the bonds and mortgages for Alice E. Bradley.

These findings were reversed by the Appellate Division which substituted for them a finding that it was the intention of Mrs. Peck in transferring the securities in question to her sister that she, Mrs. Peck, should have the use of the property during the lifetime of both sisters and at the death of either of them the survivor should become the absolute owner thereof. In addition it found that the transfer was not made for the use, comfort and benefit of Mrs. Peck, that she did not deem such disposition of the property meet and proper, that

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it was made in bad faith and for the purpose of wrongfully taking the property away from her husband's beneficiaries.

The Appellate Division thereupon reversed the judgment of the trial court and directed judgment for the plaintiffs. We are not inclined to disturb these findings of fact made by the Appellate Division as there is some evidence or reasonable inferences from the testimony and exhibits to justify them.

The judgment, however, cannot be sustained as the plaintiffs have no right to maintain the action and are not the proper parties to sue. The \$20,000 was a legacy given to the widow, Grace A. Peck, and in the nature of a life interest. It has been paid over to her by the executors absolutely and without any reservations. She became a trustee for the benefit of the remaindermen of that portion of the fund which she did not deem it meet and proper to use within the intention and purposes of the will. The executors of Mr. Peck's will had no further control over or right to this fund. When Mrs. Peck died whatever portion of the amount remained belonged to the legatees named in the twenty-fifth clause of Mr. Peck's will. They could call upon the executor or administrator of Mrs. Peck's estate for an accounting and could maintain appropriate action to follow any funds illegally disposed of. Whatever right of action there was accrued to the legatees; the executors of Mr. Peck's estate had none under the circumstances here developed. *Smith v. Van Ostrand* (64 N. Y. 278, 285) is like this case upon this point except that the action was brought by the legatees. This court said, "the plaintiffs were, I think, the proper parties to claim the fund. The executors of Garrett I. Smith, when they paid it over to the widow, parted with all interest in it, and left it to follow the course directed by the will. They were required by the will to pay it over to the widow, and having done so were discharged from all liability, and divested of all power concerning it.

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If, as in the case of *Tyson v. Blake* (22 N. Y. 558), they had taken a bond for the return of the principal to them, to be disposed of according to the will, they might have been the proper parties to sue upon the bond. But they retained no such control over the fund, and the plaintiffs are now the real and only parties interested therein, and I think the action properly brought by them."

This law was followed in *Leggett v. Stevens* (185 N. Y. 70) and has been applied by the Appellate Divisions. (*Matter of Hamlin*, 141 App. Div. 318; *Leggett v. Stevens* when before the Appellate Division in 77 App. Div. 612, and by the General Term in *Spencer v. Strait*, 40 Hun, 463.)

The judgment of the Appellate Division should, therefore, be reversed and that of the Trial Term affirmed, with costs to the appellant in all the courts.

HISCOCK, Ch. J., CHASE, COLLIN, HOGAN and CARDENZO, JJ., concur; ANDREWS, J., not voting.

Judgment reversed, etc.

HUDSON AND MANHATTAN RAILROAD COMPANY, Appellant, v. STATE OF NEW YORK, Respondent.

- Transfer tax — agreement for re-adjustment of debts of corporation and transfers to and from voting trustees — when one, only, of transfers made for and in pursuance of such agreement subject to the transfer tax.

The stock of a railroad company was delivered by the stockholders to voting trustees who delivered to each of the stockholders their certificate entitling him at the expiration of the trust agreement to a retransfer of his shares. Thereafter, and for the purpose of re-adjusting the debts of the company, an agreement was made between certain banks, as "managers," a trust company as "depositary" and the stockholders and bondholders as "depositors." After the re-adjustment was accomplished the voting trust certificates were surrendered to the first named voting trustees who issued new certificates and delivered them to new voting trustees who issued the usual certificates. Held, upon examination of the agreements and the

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facts that, for the purposes of a transfer tax, there was only a single transfer of the shares of stock and hence only one of the transfers made under the trust agreement is liable to tax under section 270 of the Tax Law.

Hudson & Manhattan R. R. Co. v. State, 180 App. Div. 81, reversed.

(Argued October 22, 1919; decided November 18, 1919.)

APPEAL from a judgment entered December 18, 1917, upon an order of the Appellate Division of the Supreme Court in the third judicial department, which reversed an award of the Board of Claims in favor of plaintiff and directed a dismissal of its claim.

The nature of the claim and the facts, so far as material, are stated in the opinion.

J. Howland Auchincloss and Lansing P. Reed for appellant. Only one transfer took place upon the transaction by which the voting trust certificates were surrendered to the old voting trustees for cancellation and the legal title to the stock transferred by the old voting trustees to the new voting trustees. (L. 1913, ch. 779, § 270; *Bonbright & Co. v. State of New York*, 165 App. Div. 640.)

Charles D. Newton, Attorney-General (Claude T. Dawes of counsel), for respondent. Two transfers of the legal title to the stock are evidenced by the making out of certificates of stock in the name of the trustees of the new voting trust. The legal title first passed from the old voting trustees to the managers and was then transferred by the managers to the trustees of the new voting trust. (*Travis v. Ann Arbor Co.*, 180 App. Div. 799.)

COLLIN, J. The Court of Claims awarded the plaintiff, a domestic corporation, the recovery of the sum of two thousand five hundred forty-five dollars and forty-two cents on account of stamps in that amount erroneously affixed by it to transferred shares of stock. The

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Appellate Division reversed the award and the consequent judgment and dismissed the claim.

The stamps were affixed in virtue of the statute: "There is hereby imposed and shall immediately accrue and be collected a tax, as herein provided, on all sales, or agreements to sell, or memoranda of sales of stock, and upon any and all deliveries or transfers of shares or certificates of stock, in any domestic or foreign association, company or corporation, made after the first day of June, nineteen hundred and five, whether made upon or shown by the books of the association, company or corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of sale or transfer, whether intermediate or final, and whether investing the holder with the beneficial interest in or legal title to said stock, or merely with the possession or use thereof for any purpose, or to secure the future payment of money, or the future transfer of any stock, on each hundred dollars of face value or fraction thereof, two cents, except in cases where the shares or certificates of stock are issued without designated monetary value, in which cases the tax shall be at the rate of two cents for each and every share of such stock. It shall be the duty of the person or persons making or effectuating the sale or transfer to procure, affix and cancel the stamps and pay the tax provided by this article. * * *." (Tax Law [Cons. Laws, chapter 60], section 270.) The authorization of the action is found in the statute. (Section 280.)

The question to be determined reaches back to the year 1908 and to a voting trust agreement between the holders of certain shares of the common stock of the plaintiff and three individuals as voting trustees. In virtue of the agreement the shares were transferred to the voting trustees, who delivered to each of the transferors their voting trust certificate as to the shares transferred by him, entitling him, as the holder of the certificate, on

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June 15, 1913 (the expiration of the agreement), to a retransfer of his shares, and, in the meantime, to receive payments equal to the dividends, if any, collected by them. The present appeal concerns only the subsequent transactions in regard to the shares of stock, as hereinafter stated, against which the voting trust certificates were issued. In January, 1913, the indebtedness of the plaintiff required readjusting, and it came to pass that an elaborate and involved agreement in writing, dated January 14, 1913, concerning the outstanding mortgage bonds and stock of the plaintiff and the voting trust certificates, was entered into between three banking houses as "managers," the Guaranty Trust Company of New York as "depositary," holders of mortgage bonds and holders of the preferred and common stock of the plaintiff, including the holders of the voting trust certificates, as "Depositors." The agreement contemplated and made provision, among many other things, that upon each share of stock which became subject to the agreement the sum of eight dollars and fifty cents should be paid and the paying shareholders should receive a newly-issued bond of specified denomination; that the depositors should deposit their holdings of bonds, or stock or voting trust certificates, duly indorsed for purposes of transfer to the managers, with, and receive from, the depositary proper certificates evidencing the deposits; the managers were empowered to secure the termination of the voting trust of 1908 and the return and deposit of the stock certificates prior to the agreed termination and return; the voting trust certificates and the shares of stock deposited were to be held in escrow by the depositary; the managers were empowered to procure and accept, for the purposes of the readjustment, the transfer to them of the shares of stock and the voting trust certificates held by the depositary, through and by filing with the depositary a certified copy of a resolution adopted by them stating their acceptance thereof, whereupon the

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title to the shares and certificates should vest in the managers, who shall thereupon be and become the owners and holders thereof, and which, thereafter, shall be held by the depositary subject to the order of the managers. Meanwhile, and until the filing of such certified resolution, the depositors shall, subject as aforesaid, be deemed to retain, and shall have, the ownership of, and title to, their respective bonds and stock, and "the Depositary shall dispose of the deposited bonds and stock of the Company in such manner as the Managers or a majority thereof may from time to time direct, * * *;" the managers were further empowered to cause the formation of the new voting trust contemplated by the plan, or a different voting trust, under a voting trust agreement containing such terms and provisions as the managers shall prescribe, and cause the deposited stock of the company to be transferred to such trustee, to be held upon the terms of such voting trust agreement, and cause voting trust certificates of such form and tenor as the managers may prescribe to be issued in exchange for such stock. The agreement discloses a comprehensive plan for the readjustment of the financial obligations of the company, promulgated and to be executed by the bankers-managers without intention to vest in them any interest or title in the shares of stock or voting trust certificates to any extent or purpose not requisite to the execution of the plan. Broad and flexible powers were given the managers, among which was that of carrying out and effectuating the agreement and plan not only in the manner specified in the agreement, but in whatever lawful manner might seem to them expedient and for the best interests of the depositors or likely to accomplish in substance the results contemplated by the plan.

The relevant actual transactions were: the readjustment was accomplished. In the process the voting trust certificates of 1908 were deposited with the depositary of the agreement of January 14, 1913, and on August 21,

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1913, a new voting trust agreement was entered into between the owners of the voting trust certificates of 1908 and three persons, Felix M. Warburg, Charles Francis Adams, 2nd, and Albert H. Wiggin, as voting trustees. On August 25, 1913, the depositary, "acting for the Managers," surrendered to the voting trustees of 1908 the voting trust certificates issued by them and requested them "to issue a certificate of the stock, to the return of which the holders of said voting certificates are entitled under the terms of said agreement (of 1908) on such surrender (of the voting trust certificates), in the name of 'Felix M. Warburg, Charles Francis Adams, 2nd, and Albert H. Wiggin, Voting Trustees under an agreement dated August 21, 1913,' and to deliver the certificate so issued to Harvey Fisk & Sons, No. 62 Cedar Street, New York City, the Agents of said Voting Trustees." Pursuant to this request the voting trustees of 1908 forthwith transferred in the usual and due course or manner the shares of stock to the voting trustees of August, 1913, and the plaintiff caused two sets of transfer tax stamps for each share to be affixed to the stock certificates surrendered by the voting trustees of 1908 to it. The new voting trustees issued the usual voting trust certificates. We are to determine whether or not, in virtue of the stated facts, the two sets of stamps, rather than one, were required by the statute we have given.

The attorney-general, in behalf of the State, asserts: the legal title to the shares of stock was vested in the voting trustees of 1908 by the agreement of that year and remained in them until transferred by them to the voting trustees under the agreement of August, 1913; the beneficial title or interest never, in the course of the stated transactions, left the holders of the voting trust certificates, who were the same persons under the two voting trust agreements; this appeal involves only the passing or transfer of the legal title to the shares of stock; the agreement of January 14, 1913, contemplated

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that when the managers so chose the legal title, or the right to regain the legal title, to the stock should vest in the managers. The attorney-general then asserts that the request of August 25, 1913, of the depositary, acting for the managers, upon the trustees of 1908, already stated by us, was, in legal effect, the regaining by the managers of the legal title to the shares plus a transfer of that legal title by the managers, after regaining it, to the new voting trustees under an entirely separate and new voting trust. The reasoning of the attorney-general is: whatever legal title to the shares the new trustees got came from the managers and not from the old trustees, because the managers, possessing the right under the agreement of January 14, 1913, alone could direct and empower the old trustees to convey to the new trustees; the title could not pass directly from the old voting trustees to the new; a necessary element in the passing of the title was the regaining from the old trustees by the stockholders or their representatives, the managers, the title; thus the legal title passed twice, once from the old trustees to the managers and the second time from the managers to the new trustees.

The reasoning is erroneous and gives no support to the assertion sought to be based upon it. In fact, as in form, there was a single transfer of the shares of stock. The agreement of January 14, 1913, did not effect a transfer or an agreement of transfer of the shares, or a certificate of any of them. Its only effect upon the ownership of or title to the stock was the creation to the managers of the privilege, exercisable upon a contingency, of acquiring the stock, or of the right to direct such other disposition of it as, in their judgment, the successful execution of the readjustment plan demanded. The privilege of acquisition the managers never exercised. They did not acquire ownership of the shares or of a certificate of shares. They did exercise the right to direct the transfer of the legal title to the shares, that

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is, the transfer by the old trustees to the new trustees. The ownership or interest of the holders of the voting trust certificates remained, for the purposes of our consideration, untransferred and unchanged. The right in the managers to direct the transfer of the stock did not include, was not dependent upon, and, under the circumstances, had no relation to the taking by the managers of the title to the stock. The title could be transferred, under lawful authority, from the old trustees to the new trustees as legally as it could be transferred from the former to the managers. Authorization existing, the new trustees could regain the title from the old trustees as effectually and lawfully as could the managers. Neither in law nor through the facts was there need or reason for passing the title to the new trustees through the managers. The power to direct the transfer to the new trustees did exist in the managers through the agreement of January 14, 1913. As we have already said, that power was not the equivalent of a vesting in them of the legal title to the stock nor did it necessitate, through implication or otherwise, such vesting.

The judgment of the Appellate Division should be reversed and the determination and judgment of the Court of Claims affirmed, with costs in the Appellate Division and this court.

HISCOCK, Ch. J., CHASE, CARDOZO, CRANE and ANDREWS, JJ., concur; HOGAN, J., not voting.

Judgment reversed, etc.

ANNIE T. SULLIVAN, Respondent, *v.* THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, Appellant.

New York (city of) — public schools — salaries of teachers.

There was issued to plaintiff in 1899 an assistant teacher's license to act as a critic teacher in a training school for teachers in the borough of Brooklyn. She was thereafter duly appointed as a critic

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teacher in said training school, entered upon and continued to perform her duties up to the time of the commencement of this action. During a period including the year 1912, plaintiff in accordance with the actual duties which she was performing was paid the salary of a model teacher, which salary was that provided for by previous enactments for a "critic" teacher. In 1913 she brought an action based on statutory and schedule provisions (L. 1900, ch. 751) as to the salaries of teachers and demanded judgment for a balance claimed to be due to her under that schedule. In that suit judgment was offered and accepted for practically the amount demanded. In 1902 the board of education adopted a new form of license by which critic teachers were licensed simply and solely as such without any reference to their being assistant teachers. In 1911 said board approved, "subject to the enactment of legislation necessary to put them into effect," new salary schedules covering training schools. The plaintiff complains because commencing with the year 1912 she has been paid under said last schedule as a critic teacher instead of as an assistant teacher. *Held*, that the board of education was not prevented in accordance with all the substantial features and duties of her position from classifying and paying plaintiff as a critic teacher rather than as an assistant one, but that the effect of the former judgment is an adjudication that she is entitled to a recovery of fifty dollars for the year 1913 by reason of the amendment to the charter by chapter 902 of the Laws of 1911.

Sullivan v. Bd. of Education, 181 App. Div. 477, reversed.

(Submitted October 13, 1919; decided November 18, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered January 18, 1918, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term without a jury and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

William P. Burr, Corporation Counsel (John F. O'Brien of counsel), for appellant. Plaintiff's salary, if the schedule of May 24, 1911, was invalid, could be computed according to the terms of the statute with which

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that schedule conflicted. (L. 1900, ch. 751, § 4.) Plaintiff was entitled subsequent to January 1, 1912, only to the salary of critic teacher as fixed in the schedule of May 24, 1911, or as fixed in such subsequent higher schedule as might be adopted in pursuance of chapter 902, Laws of 1911. The ratification by legislation cured the previous defects in the schedule. (*People ex rel. Dady v. Prendergast*, 144 App. Div. 308; 203 N. Y. 1.)

James L. Barger for respondent. While under the Davis law the board of education was authorized to fix the salaries of teachers, that power is subject to the restriction that neither the grade nor pay can be reduced. (L. 1900, ch. 751, § 4; L. 1901, ch. 466, § 1901; *People ex rel. Callahan v. Bd. of Education*, 174 N. Y. 169.) The plaintiff was a regular teacher under the classification of the Davis law. (L. 1900, ch. 751.)

HISCOCK, Ch. J. This action was brought mainly to recover a balance claimed by plaintiff to be due her for salary as a teacher in one of the training schools of the city of New York for the years 1912–1914 both inclusive and certain months of the year 1915. The real question is the one whether under the rather complicated statutes and salary schedules of the board of education of that city plaintiff is entitled to salary as an assistant teacher or as a critic teacher during the period in question. There is no dispute about the specific facts in the case, but only about the legal conclusions to be drawn therefrom. The trial court on findings of the various facts decided that the plaintiff was not entitled to any balance. The Appellate Division without disturbing in any way the findings of fact reached a contrary conclusion. With a slight modification we find ourselves in accord with the ultimate conclusion which was reached by the trial court.

At all of the times included within the limits of this controversy there were employed in the training schools

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of the city of New York teachers known respectively as assistant teachers, model teachers and critic teachers, the first class sometimes apparently being also designated in salary schedules as "regular" teachers. The duties of these different classes were clearly and substantially differentiated.

In 1899 there was issued to plaintiff "an assistant teacher's license (permanent) to act as a critic teacher in a training school for teachers in the Borough of Brooklyn" and on February 13th of that year she was "duly appointed * * * as a critic teacher in said training school, entered upon and still continues to perform her duties as such." By chapter 751 of the Laws of 1900, taking effect May 3d of that year and commonly known as the "Davis Law" the provisions of the charter of New York city (L. 1897, chap. 378, section 1091) relating to the board of education were so amended as to provide, subject to certain conditions not here necessary to be stated, that in training schools "no female junior or substitute teacher * * * shall receive less than \$700 per annum, nor after six years of service as such, less than \$1,000 per annum; no female model teacher shall receive less than \$1,000 per annum, nor after five years of service as such less than \$1,500 per annum; no female regular teacher * * * less than \$1,100 per annum, nor after ten years of service as such, less than \$1,900 per annum," and the board of education was given power to fix salaries. In 1900 and again in 1902 the board of education adopted salary schedules whereby it provided for women who held the position of "assistant (reg.) teacher" salaries running from \$1,100 to \$1,900 per annum by a regular increment of \$80 per year and for those holding the position of "model teacher" salaries ranging from \$1,000 per annum to \$1,500 per annum at the end of the fifth year. By paragraphs added to the schedule proper it was provided that "critic teachers shall receive the same salaries as model teachers" and also that "the minimum salary for

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a female regular teacher in a training school shall be \$1,100 per annum; the maximum salary therefor \$1,900; and the rate of annual increase shall be \$80."

It will have been noticed that in the statute which has been quoted there is no designation of an "assistant teacher" or of a "critic teacher" and that in the schedules proper to which reference has just been made there is no list of salaries to be paid to critic teachers, but that these salaries are elsewhere fixed by reference to those scheduled to be paid to model teachers.

During the years 1907 to 1912 both inclusive, plaintiff in accordance with the actual duties which she was performing was paid the salary of a model teacher. In 1913 she brought an action based on the statutory and schedule provisions already quoted that "the minimum salary for a female regular teacher in a training school" should be at least \$1,100 per annum and by annual increments of \$80 should increase to \$1,900 per annum and demanded judgment for a balance claimed to be due to her under those provisions over and above what had been paid to her under the schedule for model teachers. In this suit judgment was offered and accepted for practically the amount demanded.

In 1902 the board of education adopted a new form of license by which critic teachers were licensed simply and solely as such without any reference to their being assistant teachers. May 24th, 1911, said board approved "subject to the enactment of legislation necessary to put them into effect" new salary schedules covering training schools. Under these schedules and subject to certain conditions which it is not necessary to specify assistant teachers were to receive salaries commencing at \$1,000 per annum and increasing by increments of \$100 per annum for three years and of \$150 for nine years until they reached a maximum of \$2,750, and critic teachers were to receive an annual salary commencing at a minimum of \$1,050 and increasing with an

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annual increment of \$80 until it reached the maximum of \$1,850. Subsequently by a new schedule these last rates of salary were so changed that commencing with the same minimum of \$1,050 they reached at the end of the eighth year a maximum of \$2,050 per annum.

After the schedule of May, 1911, had been tentatively adopted as aforesaid there was passed a statute taking effect October 30, 1911, whereby section 1091 of the charter of Greater New York covering this subject of salaries was amended so as to provide that: "The salary * * * to which a present member (of the teaching staff in the schools of the City of New York) is entitled under a specific salary schedule now existing shall not be reduced. Beginning with the first day of January, 1912 * * * the salaries * * * of all members shall be not less than those fixed in the schedules and schedule conditions approved by the Board of Education on the * * * 24th day(s) of May, 1911 * * *. A copy of such schedules and schedule conditions * * * certified by the Secretary of the Board, shall, within thirty days hereafter, be filed in the office of the Secretary of State." (L. 1911, ch. 902.)

As stated at the commencement the plaintiff complains because commencing with the year 1912 she has been paid under said last schedule as a critic teacher instead of as an assistant teacher.

Were it not for her former suit we should not find any basis for any recovery by plaintiff. It is true that at the time she was first appointed there had been issued to her an "assistant teacher's license." Not much light is thrown upon the various kinds of certificates or licenses issued by the board of education at that time and it would be mere conjecture to attempt to say why the license which was issued employed those terms. The outstanding facts, however, are that this license was issued to her "to act as a critic teacher" and that she was appointed as such and from February, 1899, to the present time has

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continued to discharge the duties of such position. This seems to make a pretty plain case that her position has been and is that of a critic teacher.

Chapter 750, Laws of 1900 (Davis Act), above referred to, did not specifically recognize the position of critic teacher in the training schools. It recognized the position of model teacher, of junior or substitute teacher and of regular teacher. The salary schedules proper fixed salaries for assistant or regular teachers and for model teachers and then attempted to provide that a critic teacher should receive the same as a model teacher. There seems to have been a chance under this statute and these schedules for plaintiff to take the position as between somewhat contradictory provisions that for salary purposes she was a regular teacher and this she did with success and collected pay as such. As we have seen, however, the statutory amendment of 1911, whatever the law may have been before, recognized and validated, as evidenced by the salary schedules in said statute referred to, a classification of teachers for salary purposes as assistant, model and critic teachers and this action must rest upon and be governed by that statute and that classification. Subject to one minor qualification we find nothing which prevented the board of education in accordance with all the substantial features and duties of her position from classifying and paying plaintiff as a critic teacher rather than as an assistant one.

Plaintiff seeks relief in this action for the year 1912. That of course she is not entitled to. Her prior action brought after the present statute had gone into effect asked relief for the year 1912 and the judgment secured by her thereunder is a bar to any further relief for that year even if she were otherwise entitled to it. We think, however, that that former judgment does secure a small benefit to her in this action. That action adjudicated that plaintiff as a regular teacher had reached a point prior to 1911 where she was entitled to a salary of \$1,900 under the

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schedules then prevailing. For the year 1913 under the schedule adopted in May, 1911, she received a salary of \$1,850, or fifty dollars less than the amount mentioned. The statutory amendment of 1911 under which the new salary schedules were adopted provided that: "The salary * * * to which a present member is entitled under a specific salary schedule now existing shall not be reduced." We are inclined to think that this meant the salary schedules in existence before the one of 1911 was adopted. That latter salary schedule was being validated by the statute then being passed and we think that the language of the enactment was not intended to refer to a schedule which would become effective after it was adopted, but rather referred to a schedule in existence down to that time. This view would entitle plaintiff to a recovery of fifty dollars for the year 1913, because after that the schedule which has been applied to her gave her a salary of more than nineteen hundred dollars.

The views which we have expressed sufficiently indicate our opinion that plaintiff is not entitled to any relief under her other prayer for a judgment requiring the board of education to re-rate her on the salary schedules and payrolls.

In accordance with these views the judgment of the Trial Term and order of the Appellate Division should be reversed and judgment directed for plaintiff for the sum of fifty dollars, with interest thereon from January 1, 1914, together with costs in all courts.

CHASE, COLLIN, CARDODOZO, POUND, CRANE and ANDREWS, JJ., concur.

Judgment accordingly.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY et al., Appellants, v. THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, SECOND DISTRICT, Respondent.

In the Matter of the Application of FRONTIER AND WESTERN RAILROAD COMPANY, Respondent.

Railroad Law — Public Service Commissions Law — provision of Railroad Law requiring certificate of public convenience and necessity before construction of railroad — provision of Public Service Commissions Law requiring approval and permission of commission for proposed railroad — construction and application of such provisions.

1. The provision, added to the Railroad Law (Cons. Laws, ch. 49, § 9) in 1892, requires a railroad corporation to secure from the railroad commissioners a certificate of public convenience and necessity before construction. The fundamental purpose of this enactment was not to require the commissioners to pass upon and adopt or reject the precise location of the road as defined by some map, but rather to determine whether public considerations warranted the construction of a road along the route which was generally fixed by specification in the certificate of incorporation of termini, length and counties to be traversed. The object was to permit the railroad commissioners to prevent wasteful competition and public disaster by the construction of roads through localities which already were adequately served rather than to require them to determine the precise line along which roads should run.

2. There is no provision of the Railroad Law, either in section 9 or elsewhere, which requires a railroad company, seeking a certificate of convenience and necessity for a proposed railroad, to file with its application a map indicating with precision and in detail the proposed location of its road; nor is the public service commission, in passing upon the application, limited to a consideration of the particular line defined by such a map or even by other ones filed in the course of the proceedings.

3. Assuming that an application for a certificate of public convenience and for permission to construct a railroad can be made under section 9 of the Railroad Law and section 53 of the Public Service Commissions Law (Cons. Laws, ch. 48) at the same time, and that the com-

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mission can pass on the application for permission and approval under section 53 at the same time that it considers the application for a certificate of convenience and necessity, nevertheless, having made a determination that public convenience requires the construction of petitioner's railroad somewhere within the lines of the general route specified in its certificate of incorporation, as might be thereafter fixed under proper proceedings, the commission cannot make an order predicating its permission and approval under section 53 upon the condition that the petitioner shall adopt the exact line of construction specified in the order, which fixed one of the termini of the proposed railroad two thousand feet distant from the terminus fixed in the articles of incorporation and which change necessitated the intersection of an important branch of an opposing railroad by the route of petitioner's railroad.

4. Where, as in this case, the commission granted the general certificate of convenience and necessity by one part of its order under the provisions of the Railroad Law, but did this with the view and belief that it could then incorporate provisions under section 53 of the Public Service Commissions Law whereby it would fix the exact line of petitioner's road and thereby accomplish what it deemed to be wise and necessary, the two provisions of the order are connected and must be considered together and it must be assumed that, in making this decision in favor of a certificate of public convenience and necessity, the commission was influenced by what it purposed to do in the succeeding provisions limiting the route of petitioner. It follows, therefore, that no part of the order can be allowed to stand, that the order of the Appellate Division should be annulled and the proceedings remitted to the commission to pass upon the question of public convenience and necessity for the railroad in accordance with the rules above stated.

People ex rel. N. Y. C. & H. R. R. Co. v. Public Service Comm.,
171 App. Div. 366; reversed.

(Argued October 6, 1919; decided November 25, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered January 5, 1916, which dismissed a writ of certiorari and confirmed an order of the public service commission, second district, granting to respondent Frontier and Western Railroad Company a certificate of public convenience and necessity.

The facts, so far as material, are stated in the opinion.

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Maurice C. Spratt for New York Central Railroad Company et al., appellants. The commission exceeded its powers in granting a certificate for route A-B-C. (*People ex rel. D. Ry. Co. v. Comm.*, 4 App. Div. 263; *Matter of Riverhead, Q. & S. R. R. Co.*, 36 App. Div. 517; *People ex rel. N. Y. C. R. R. Co. v. Comrs.*, 92 App. Div. 126; *Matter of Ticonderoga R. R. Co.*, 116 App. Div. 56; L. 1910, ch. 481, § 9; *People ex rel. Stewart v. R. R. Comrs.*, 160 N. Y. 202; *Matter of Amsterdam, J. & G. R. R. Co.*, 86 Hun, 578.)

George Clinton for Riverside Association et al., appellants. The decision of the commission to grant a certificate permitting the construction of the road upon route A-B-C is beyond its powers. (*Matter of Poughkeepsie Bridge Co.*, 108 N. Y. 483.)

William S. Rann, Corporation Counsel (*Jeremiah J. Hurley* of counsel), for city of Buffalo, appellant. The public service commission has no power to grant a certificate of convenience and necessity upon a route not filed as required by the statute. (*People ex rel. D. & S. R. R. Co. v. Railroad Comrs.*, 4 App. Div. 259; *Matter of R., Q. & S. R. R. Co.*, 36 App. Div. 514; *People ex rel. N. Y. C. & H. R. R. Co. v. R. R. Comrs.*, 92 App. Div. 126; *People ex rel. Stewart v. R. R. Comrs.*, 160 N. Y. 202.) The certificate granted is in violation of the statute because it does not specify that public convenience and necessity require the construction of the railroad described in the certificate of incorporation. (*People ex rel. N. Y. C. & H. R. R. R. Co. v. R. R. Comrs.*, 92 App. Div. 126.)

Edward Payson White for King Sewing Machine Company, appellant. The question whether a railroad corporation should receive a certificate that public convenience and necessity require its construction has been committed to the public service commission for a judicial determination. (*People ex rel. U. & D. R. R.*

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Co. v. P. S. Comrs., 218 N. Y. 129; *People ex rel. B. L. H. & P. Co. v. Stevens*, 203 N. Y. 7; *People ex rel. Stewart v. R. R. Comrs.*, 160 N. Y. 202; *Village of Saratoga Springs v. Saratoga Gas, etc., Co.*, 191 N. Y. 123; *People ex rel. N. Y. C. & H. R. R. Co. v. Public Service Commission*, 195 N. Y. 157.) The nature of the issue to be determined required the applicant to specify a definite route for its railroad. (Cons. Laws, ch. 49, §§ 9, 89; Cons. Laws, ch. 48, § 53.)

Edward W. Hatch for respondent. There is no merit in the claim that the commission has improperly changed the northerly terminus of the Frontier Terminal railroad. (*People ex rel. S. S. Traction Co. v. Wilcox*, 196 N. Y. 212; *Village of Fort Edward v. H. V. Ry. Co.*, 192 N. Y. 139; *People ex rel. T. A. Ry. Co. v. P. S. Comrs.*, 203 N. Y. 299; *People ex rel. N. Y., N. H. & H. R. R. Co. v. Willcox*, 200 N. Y. 423; *People ex rel. Wood v. Lacombe*, 98 N. Y. 43; *Matter of Brooklyn, Q. C. & S. R. R. Co.*, 185 N. Y. 171; *Hankins v. Mayor*, 64 N. Y. 18; *Davis v. Supreme Lodge*, 165 N. Y. 159; *Matter of Tiffany*, 179 N. Y. 455; *Ward v. Erie R. R. Co.*, 87 Misc. Rep. 365, 370; 167 App. Div. 950; *D., L. & W. R. R. Co. v. City of Buffalo*, 65 Hun, 464.)

Hiscock, Ch. J. Prior to October 29, 1909, the respondent Frontier and Western Railroad Company was incorporated for the purpose of constructing and operating a steam railroad. As provided by law its certificate of incorporation amongst other things fixed precisely the location of the termini of the proposed road which were both within the county of Erie, stated its length which was four miles and specified that its route lay entirely within the said county.

At about the date specified it presented to the public service commission a petition asking that the latter certify that it had complied with the necessary preliminary conditions fixed by law and that public convenience and

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necessity required the construction of said railroad as proposed in its certificate of incorporation, and that permission and approval for and of the construction of its road be granted. At the hearings by the commission for the purpose of passing upon said application much opposition developed on the part of various railroad corporations and to which in time was added the opposition of various property owners and of the city of Buffalo. In accordance with a rule established by the commission and their understanding of the statutes covering the subject, a map was filed by the petitioner showing exactly and in detail the proposed route of the railroad. After extended hearings and the production of much evidence the application was denied. The order of denial which it made and an opinion handed down therewith by one of the commissioners warranted the belief that the commission had been led to deny the application because it did not approve of the construction of a railroad upon the route indicated by the original map filed by petitioner and did not regard itself as having authority to grant a certificate for the construction of the road upon any other route.

On a writ of certiorari to review this determination it was by the Appellate Division in effect held that under the provisions of the Railroad Law upon such an application as this the applicant was not compelled to file a map showing the exact location of the route which it proposed to take and that the public service commission was not compelled or permitted to pass upon the application on the theory that construction could only be had upon such route, and in accordance with this view the proceedings were remitted to the commission to pass upon the application and decide whether public convenience and necessity warranted the construction of a road on the line identified in the articles of incorporation and with the instructions that in the determination of that question the commission should consider any route which did not vary the location of the road as identified in such articles of incorporation.

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In accordance with this decision and direction the commission again took up the consideration of the application upon the evidence already taken and more testimony which was added thereto. As a result of this second and further consideration an order was made which in the present certiorari proceedings is attacked and presented to us for review. By this order the commission purporting to act first under section 9 of the Railroad Law (Cons. Laws, ch. 49), granted a certificate of public convenience and necessity and then purporting to act under section 53 of the Public Service Commissions Law (Cons. Laws, ch. 48), ordered "That permission and approval be and is hereby given pursuant to Section 53 of the Public Service Commissions Law for the construction of said railroad upon said route known as A-B-C, and the giving of such permission and approval is limited thereto, subject however to the right of the applicant to apply for a modification or change of such route for any reason which shall create a necessity therefor."

It may be briefly stated for the purpose of making plain these last provisions that maps had been filed by the petitioner and others of routes designated as A, B and C, and that the route adopted by the commission as the imperative condition of its consent was not only a combination of these routes but that such combined route fixed one of the termini of the proposed railroad two thousand feet distant from the terminus fixed in the articles of incorporation, and that this change necessitated the intersection of an important branch of one of the opposing railroad corporations by the route of petitioner's road.

Some of the objections now urged to the determination of the public service commission may be dismissed with brief mention. In our opinion the claims made upon the hearing before the commission that public interests would not be served by the construction of the proposed

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road, that the project was a promotion scheme and not a meritorious enterprise and that capital could not be legitimately obtained for construction of the road so far as material presented considerations of fact which became involved in the ultimate inquiry whether a certificate should issue, and that upon all of the evidence the determination of the commission would have been controlling upon us if unaffected by errors of law cognizable by us. There are, however, two important inquiries which seem to be presented by the determination and order of the public service commission.

The first of these is the one whether the petitioner seeking a certificate of convenience and necessity under section 9 of the Railroad Law was required with its application to file a map indicating with precision and in detail the proposed location of its road and whether the commission in passing upon the application was limited to a consideration of the particular line defined by such map or even by other ones filed in the course of the proceedings. We agree with the view of the Appellate Division set forth in the very comprehensive and accurate opinion of Mr. Justice LAMBERT on the first appeal that there is nothing in the provisions of the Railroad Law which sustains an affirmative answer to either of these connected questions.

We look in vain for any provision which reasonably requires the applicant to file such a map as a condition or necessary accompaniment of its application. Undoubtedly as a matter of convenience, information and evidence, the commission may, as it does, by its rules require such a map to be filed and the petitioner or its opponents might voluntarily file maps, but we find no statutory compulsion of this. The references in various provisions of the statute to maps used upon such a proceeding or to be presented to the commission do not sustain any other view than the one thus expressed. For instance the provision in section 9 requiring the certification by the

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commission of maps in case it denies an application contemplates that maps undoubtedly would be filed and used upon the hearing and, therefore, provides for presentation of these to the Appellate Division with other evidence when it reviews the decision which has been made. The provision in section 89 requiring maps to be presented to the commission showing intersections of highways and streets by the proposed road clearly was not intended to facilitate or control the precise location of the route.

Not only are there no provisions in the Railroad Law limiting the commission in its consideration of the inquiry whether a certificate shall be granted, to a particular line designated on a map, but on the contrary we think the history and language of the provisions of the Railroad Law governing this subject strongly negative any such theory. Prior to 1892 sections 2 and 6 of the Railroad Law contained substantially the same provisions now found in sections 5 and 16 of that law requiring a railroad corporation to give in its certificate of incorporation a general description of its proposed route and later to file a map showing exactly the proposed line of its road, and to give notice thereof in order that objections by property owners to such proposed route might be considered and the location thereof finally and definitely fixed. There was no provision giving the railroad commission any duty or power in respect of such exact location.

In 1902 without in any manner repealing these provisions providing for the location of the route of the proposed railroad without the help of the railroad commissioners a new section was added requiring the corporation to secure from the railroad commissioners a certificate of public convenience and necessity before construction. It is well understood that the fundamental purpose of this enactment was not to require said commissioners to pass upon and adopt or reject the precise

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location of the road as defined by some map but rather to determine whether public considerations warranted the construction of a road along the route which was generally fixed by specification of termini, length and counties to be traversed in the certificate of incorporation. The object was to permit the railroad commissioners to prevent wasteful competition and public disaster by the construction of roads through localities which already were adequately served rather than to require them to determine the precise line along which roads should run.

Even further than this it appears that if the commission should spend its time in considering and requiring the location of the proposed road on a specifically definite line such location even when fixed by it would not control the result of proceedings instituted under section 16 for the location of the road and would not prevent the exercise by the board of directors of the corporation of that power to change the route which is conferred by section 24.

Therefore, we hold that in passing upon petitioner's application for a certificate of public convenience and necessity under the provisions of the Railroad Law the commission was required to test such application by considerations which were applicable to the route as generally defined in the articles of incorporation and not to answer it on the theory that some exact line within that route specified by it or delineated on some map would be controlling. This is what was done by the commission on this branch of petitioner's application and we then come to the second important inquiry whether having done this the commission had the power under section 53 of the Public Service Commissions Law to modify and limit its prior action by placing its permission and approval for and of the construction of the road in that section provided for upon the condition that a specific line be followed.

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This involves a consideration of the purpose and meaning of said section which has been a source of judicial perplexity on more than one occasion. This court has never yet attempted completely to fathom the legislative mind and decide what its complete purpose was in enacting the section or to determine the full extent to which its provisions invested with powers and duties the public service commission in its regulation and control of the organization, construction and operation of steam railroads. Our views of the section so far as they have gone have been expressed in decisions determining what it did *not* mean and in holding what it did *not* authorize. (*Village of Fort Edward v. Hudson Valley Rway. Co.*, 192 N. Y. 139; *People ex rel. N. Y., N. H. & H. R. R. Co. v. Willcox*, 200 N. Y. 423; *People ex rel. Third Ave. Rway. Co. v. Public Service Commission*, 203 N. Y. 299.) Pertinent considerations of the present case will chiefly lead us along the same line.

We might easily limit our consideration by holding that in giving permission and approval under section 53 for the construction of applicant's road conditioned upon the adoption of a certain line, the present order is unauthorized for a special reason. The route prescribed by the commission involved moving one of the termini of the proposed road from the point fixed in the articles of incorporation to another point distant therefrom over two thousand feet, this change involving the intersection by the proposed road of an additional line of existing road. We think that this alteration of the location of a terminus of itself rendered the action of the commission in the respect now under discussion entirely invalid. It was thought by the Appellate Division that this change was so unsubstantial and immaterial that it might be disregarded, but we disagree with this view. Possibly it might be held that in the location of the route of a railroad two or three hundred miles long the shifting of a

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proposed terminus by a few hundred feet would not be of consequence when tested by the magnitude of the entire undertaking, but here the proposition was to change the location of one terminus of a road only four miles long and running through a thickly congested territory by nearly half a mile and thereby necessitating an extra intersection of railroads. We do not believe that either as matter of law or of fact such alteration can be disregarded as immaterial.

But inasmuch as this error might be corrected upon another hearing it seems best to consider in a broader way the meaning and effect of section 53 as applied to the present proceeding.

The section quite distinctly divides into two classes the acts of a railroad corporation which require for performance prior permission and approval of and by the public service commission. In one class is the process of construction and in another class is "any franchise or right under any provision of the Railroad Law or of any other law." No one of these acts or rights can be performed or exercised until the permission and approval of the commission has been secured.

There is no particular difficulty in appreciating the propriety of the section in respect of the latter class of acts and of the requirement for such permission and approval. In fact in many of the provisions both of the Railroad Law and of the Public Service Commissions Law conferring various rights, franchises and privileges upon a railroad corporation it is specifically provided that the exercise thereof shall be subject to the permission and consent of the public service commission. It is easy to understand that in the way of reasonable prudence the legislature may have deemed it wise to enact a general provision such as is now found in section 53 to cover some case where a privilege had been granted without specific requirement for such prior consent.

The purposes of the section in requiring approval and

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permission of the commission before a railroad corporation can undertake construction of its road are more obscure where application under section 9 of the Railroad Law and section 53 of the Public Service Commissions Law are made at the same time. We know that on the application under the provisions of the Railroad Law for a certificate of public convenience and necessity the commission is permitted and it is the practice, especially if opposition to the application arises, thoroughly to weigh all of those considerations which properly enter into the determination of the ultimate question whether the public interests will be served by the construction of a road along the general route indicated in the certificate of incorporation. It would seem as though the action of the commission if it grants a certificate would be sufficient evidence of its permission and approval for and of the construction of the road and of course this was the view prior to the enactment of the Public Service Commissions Law in 1910.

However, we have section 53 which does require permissive and approving action by the commission in addition to the certificate of public convenience and necessity and it is our duty to give a reasonable interpretation to it.

The provisions of the Railroad Law requiring a certificate of public convenience and necessity relating only to the general route specified in the certificate of organization and the further provisions of such statute providing for the exact location of the road have not been repealed expressly nor in our opinion by implication. We, therefore, have the case of two statutes relating to the same subject-matter with the requirement that they be so construed if possible as to operate harmoniously and reasonably. As has been said it is not necessary to attempt to forecast the full scope of section 53, but we shall content ourselves with stating what in our judgment cannot be done under it in this case.

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No question is here raised but that it is permissible for the commission as it did in this proceeding to pass on the application for permission and approval under section 53 at the same time that it considers the application for a certificate of convenience and necessity under the Railroad Law, and for the purposes of this appeal we are adopting that view. It would be an unreasonable and absurd interpretation of section 53 if we should hold that a public service commission which after an arduous contest and a long hearing had decided that a certificate of public convenience and necessity ought to be granted, might then without any intervening considerations decide under section 53 that it nevertheless would not grant the permission and approval necessary to make its certificate operative for the construction of the road. We think that it would be an interpretation, unjustifiable only in lesser degree, if we should hold that the commission after granting such certificate of convenience and necessity under which the location of the road was limited only by the description in the certificate of organization, might then without new circumstances modify or nullify its certificate by conditioning its permission and approval under section 53 on the limitation that the road should be built on an exactly specified line. To such a condition there are two-fold objections. In the first place it would enable the commission indirectly to prescribe the exact line of the road when it had no direct power to do this, and in the second place its condition would be futile because the location of the road would still be subject to fixation under the provisions of the Railroad Law to which reference has been made notwithstanding the condition and action of the commission.

Therefore, we hold that the commission had no power to make an order predicating its permission and approval under section 53 upon the condition that the petitioner should adopt the exact line of construction therein specified.

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In principle we think that the question presented in this case is not unlike the one which was considered in the case of *People ex rel. South Shore Traction Company v. Willcox* (196 N. Y. 212, 217).

In that case upon the application of the relator it was determined by the public service commission that the construction of a line of street railway was both necessary and convenient for the public service. Nevertheless the commission refused to grant permission and approval under section 53 because it was thought that if granted the applicant company would be put in a position of control for street railway purposes of a certain thoroughfare under conditions which would be disadvantageous to the public. We held that these considerations did not authorize the public service commission to withhold its permission and approval, saying: "Assuming, without deciding, that the powers of the public service commission under section 53 of the Public Service Commissions Law are broader than were the powers of the board of railroad commissioners in respect to certificates of public convenience and necessity, we think that there is no tenable construction of the existing statute which authorizes the public service commission to do what it has attempted to do in this case. The mere possibility of future contingencies which might arise in a period of fifty years could not properly be considered as reasons for declining to sanction the construction of a railroad line" which was demanded by considerations of public convenience and necessity.

So in this case the public service commission having made what on its face was a determination that public convenience and necessity required a construction of petitioner's railroad somewhere within the lines of the general route specified in its certificate of incorporation as such location might be thereafter specifically fixed under proper proceeding, it could not in our judgment turn around and limit its action to a consent predicated on the

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use of a certain specified line when the location of such line was something over which it had no power.

There remains to consider one further question. That question is the one whether the provisions of the order made by the public service commission which we have held to have been unauthorized and illegal may be detached from the remaining provisions and thus disregarded and the order allowed to stand so far as it grants a certificate of public convenience and necessity.

We should be glad if this could be done, for whatever the final disposition upon the merits may be there is no doubt that the labors and expense of the petitioner in attempting to procure permission to construct its road have been greatly increased through the misinterpretation by the public service commission of the statutes which cover the proceeding. We do not, however, think it is possible to relieve the petitioner by a process of separation of the different provisions of the order which has been made and thus, by elimination of the illegal provisions, affirm the balance of the order. A court is not justified in eliminating and disregarding illegal provisions of an order unless it is apparent that the provisions which are legal in form are not connected with and affected by those which are illegal. We do not think that we can fairly say that that is the present case, but must say that the reverse is true. The history of this proceeding as we have detailed it indicates that the commission was largely possessed of the idea that it had the duty and power to fix the specific, exact line of petitioner's road if it granted a certificate of convenience and necessity. While the decision of the Appellate Division on the first appeal made it clear that it did not have this power under the provisions of the Railroad Law it still clung to the idea apparently that it could do this as a condition of granting a permission and approval under section 53. Therefore, it seems plain to us that the commission granted the general certificate of convenience and neces-

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sity by one part of its order under the provisions of the Railroad Law, but did this with the view and belief that it could then incorporate provisions under section 53 of the Public Service Commissions Law whereby it would fix the exact line of petitioner's road and thereby accomplish what it deemed to be wise and necessary. Thus it seems plain that the two provisions of the order are connected and must be considered together and that in making this decision in favor of a certificate of public convenience and necessity we must assume that the commission was influenced by what it purposed to do in the succeeding provision limiting the route of petitioner. If this view is correct no part of the order can be allowed to stand. It is the right of the opponents of the road to have the public service commission say without limitation and the imposition of what it deems to be safeguards in respect of the exact line of route, whether public convenience and necessity require the construction of the road through the locality and along the route which is generally defined by the articles of incorporation and subject to the location of the specific line by proceedings in another form. That question we do not think has been fairly passed upon and, therefore, it becomes necessary to remit the proceedings to the public service commission to consider it.

The order of the Appellate Division should be reversed, the writ sustained, the determination of the public service commission annulled and the proceedings remitted to that commission to pass upon petitioner's application in accordance with the rules herein stated, without costs.

CHASE, COLLIN and POUND, JJ., concur; CRANE, J., dissents; McLAUGHLIN, J., not sitting; HOGAN, J., absent.

Ordered accordingly.

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In the Matter of the Accounting of JAMES S. MENG,
as Executor of HENRY BISCHOFF, Deceased, Respondent
and Appellant.

ELIZABETH BISCHOFF, Appellant and Respondent;
MORGAN J. O'BRIEN, JR., as Special Guardian,
Respondent.

Attorney and client — contingent fee — contract between attorney and client valid in absence of fraud — such contract, however, between attorney and executor for prosecuting action for death subject to review by court — distribution of recovery in action under the statute — meaning of term "children" in section 1903 of Code of Civil Procedure.

1. A contingent fee contract made between client and attorney on retaining the latter is, in the absence of legal fraud, valid. But when the contract is between the executor or administrator under section 1902 of the Code of Civil Procedure and an attorney, for the purpose of prosecuting or maintaining an action under the section, the law imposes the additional condition that as to the damages received, or as to the beneficiaries, the contract is subject to the power of the court to determine the reasonable or suitable compensation or expenditure to the attorney which may be deducted from the recovery. The contract, as a matter of law, through implication, includes that rule of law.

2. The word "children" is always considered to have been used in its primary sense, and to exclude grandchildren, unless there be something in the document in which it occurs, whether statute, will or contract, which requires a different construction.

3. Section 1903 of the Code of Civil Procedure has since the amendment of 1911 contained the provisions: "The damages recovered in an action, brought as prescribed in the last section, * * * are exclusively for the benefit of the decedent's husband or wife, and next of kin; and, when they are collected, they must be distributed by the plaintiff, * * * as if they were unbequeathed assets, left in his hands, after payment of all debts, and expenses of administration; subject, however, to the following provisions, to wit: 1. In case the decedent shall have left him surviving a wife or husband, but no children, the damages recovered shall be for the sole benefit of such wife or husband." Held, that the word "children" as used in the section does not include grandchildren and that where a decedent left a widow and grandchildren and no children, the damages recovered

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in such an action go to the widow and that the amendment of 1911 does not contravene the provisions of section 18, article 1 of the Constitution which interdicts the abrogation of the right of action then existing to prosecute with effect an action to recover damages for injuries resulting in death.

Matter of Meng, 188 App. Div. 69, reversed.

(Argued October 7, 1919; decided November 25, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 20, 1919, which affirmed a decree of the New York County Surrogate's Court settling the accounts of the executor of Henry Bischoff, deceased, of a fund recovered as damages for negligence causing the death of the testator.

The facts, so far as material, are stated in the opinion.

Francis M. Scott for Elizabeth Bischoff, appellant and respondent. The appellant, Elizabeth Bischoff, widow of the decedent, is entitled to receive the whole amount recovered, less the deduction authorized by statute. (*Matter of Brennan*, 160 App. Div. 401; *Matter of Truslow*, 140 N. Y. 600; *Low v. Harmony*, 72 N. Y. 408; *Palmer v. Horn*, 84 N. Y. 520; *Patchen v. Patchen*, 121 N. Y. 432; *Train v. Davis*, 49 Misc. Rep. 162; *Prowitt v. Rodman*, 37 N. Y. 42; *Matter of Paton*, 111 N. Y. 480; *Pfender v. Depew*, 136 App. Div. 631; *Beebe v. Estabrook*, 79 N. Y. 246; *Matter of Pulis*, 220 N. Y. 196.) The counsel fee allowed to the executor's attorneys by the surrogate and approved by the Appellate Division was ample and should not be increased. (Code Civ. Pro. § 1903; *Lee v. Van Voorhis*, 78 Hun, 575; 145 N. Y. 603; *Murray v. Waring H. Mfg. Co.*, 142 App. Div. 514; *Matter of Friedman*, 136 App. Div. 750.)

Samuel Seabury, Albert Massey and Charles Trosk for James S. Meng, as executor, respondent and appellant. If the word "children" in the 1911 amendment to section

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1903 of the Code was correctly construed by the Appellate Division as excluding grandchildren, then that court correctly held the amendment to be unconstitutional and void because violative of section 18 of article 1 of the State Constitution. (*Hamilton v. Erie R. R. Co.*, 219 N. Y. 343; *Cohen v. L. I. R. R. Co.*, 154 App. Div. 603; *Drake v. Gilmore*, 52 N. Y. 389; *Matter of Connor*, 222 N. Y. 653; *Quinn v. Moore*, 15 N. Y. 432; *Oldfield v. N. Y. & H. R. R. Co.*, 14 N. Y. 316; *Tilley v. H. R. R. Co.*, 24 N. Y. 474; *Murphy v. N. Y. C. & H. R. R. R. Co.*, 88 N. Y. 445; *Hegerich v. Keddie*, 99 N. Y. 267; *Stuber v. McEntee*, 142 N. Y. 200; *Tipp v. Otis Brothers & Co.*, 161 N. Y. 562.) There being no evidence to support any finding, whether of fact or law, that the contingent fee contract was unreasonable or unfair; but, on the contrary, the only evidence on the issue affirmatively establishing, as it does, that the contract was both fair and reasonable under the circumstances, the order appealed from, in so far as it affirms the decree of the surrogate, should be reversed and the decree modified so as to embody the allowance to the executor of the credit claimed in his account for the payment made by him to his attorneys under the said contingent fee contract. (*Lee v. Van Voorhis*, 78 Hun, 575; 145 N. Y. 603; *Matter of Atterbury*, 222 N. Y. 355; *Murray v. Waring Hat Mfg. Co.*, 142 App. Div. 514; *Matter of Weber*, 102 Misc. Rep. 635; *Matter of Summerville*, 145 App. Div. 931; *Matter of Reich*, 170 App. Div. 912; *United States v. Telephone Co.*, 167 U. S. 224; *Matter of Watson*, 101 App. Div. 550; *U. S. v. Union Pacific R. R. Co.*, 91 U. S. 72; *Hyde v. Equitable L. Assur. Socy.*, 61 Misc. Rep. 518, 526.) Assuming, but not conceding, that it was not error to receive proof of the reasonable value of the services rendered, and that the evidence may be considered such as would support a finding that the sum paid the attorneys was more than their reasonable value, such a finding would not furnish ground for surcharg-

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ing the account, because before it can be surcharged it must appear that the amount paid is so out of all proportion to the true value of the services rendered that no reasonable man could help but conclude that it was grossly excessive and greatly beyond what an ordinary diligent and prudent trustee, acting in good faith, would have paid under similar circumstances. Not only is there no such finding, but there is no evidence upon which such a finding could have been based. (*Matter of Snedeker*, 95 App. Div. 149; *Matter of Watson*, 101 App. Div. 550; *Purdy v. Lynch*, 145 N. Y. 462.) The decision of the Appellate Division in this case is unsound in principle and is in utter disregard of the law. (*Lee v. Van Voorhis*, 78 Hun, 575; 145 N. Y. 603; *Matter of Atterbury*, 222 N. Y. 355; *Matter of Weber*, 102 Misc. Rep. 635; *Reed v. McCord*, 160 N. Y. 330.)

Morgan J. O'Brien, Jr., special guardian. If section 1903 of the Code of Civil Procedure as amended in 1911 is to be construed as excluding grandchildren, then that section is unconstitutional because it violates section 18, article 1 of the Constitution of this State. (*O'Reilly v. Utah, etc., Stage Co.*, 87 Hun, 406; *Sherrill v. O'Brien*, 188 N. Y. 185; *People v. Mosher*, 163 N. Y. 32; *Matter of Tuthill*, 163 N. Y. 133; *Matter of Burns*, 155 N. Y. 23; *People v. O'Brien*, 111 N. Y. 1; *Haverstraw v. Eckerson*, 124 App. Div. 18; 192 N. Y. 51; *Gautier v. Ditman*, 204 N. Y. 20; *Rosin v. Lidgerwood Mfg. Co.*, 89 App. Div. 245; *Ives v. S. B. Ry. Co.*, 201 N. Y. 271; *Quin v. Moore*, 15 N. Y. 432.) Irrespective of the question of constitutionality of the act under consideration, the grandchildren of the deceased are entitled to share in the distribution of the fund. (*Prowitt v. Rodman*, 37 N. Y. 42; *Matter of Paton*, 111 N. Y. 486; *Pfender v. Depew*, 136 N. Y. 639; *Beebe v. Eastabrook*, 79 N. Y. 246; *Earl of Tyrone v. Marquis of Waterford*, 1 De Gex, F. & J. 637.) The contingent fee contract entered into between

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the executor and his attorney for thirty-three and one-third per cent of the recovery was unreasonable and unjust and is not binding upon the infant grandchildren, and the surrogate was, therefore, correct in holding that the executor should be surcharged \$11,211.45, together with interest, being the difference between the amount paid by the executor to his attorney and the amount of the reasonable value of the attorney's services fixed by the surrogate. (*Cole v. Superior Court*, 49 Am. Rep. 78; *Lee v. Van Voorhis*, 145 N. Y. 603; *Murray v. W. H. Mfg. Co.*, 142 App. Div. 514; *Matter of Friedman*, 136 App. Div. 750.)

Earl D. Deremer for Annie L. Meng, respondent.

COLLIN, J. This proceeding was an accounting in the Surrogate's Court of New York county by James S. Meng, as executor of the last will and testament of Henry Bischoff, deceased. It was instituted December 22, 1915, by the filing of the petition and account of the executor, under section 2720 of the Code of Civil Procedure. The estate involved was the sum of \$82,036.70, the avails of a judgment recovered, under sections 1902-1905 of the Code of Civil Procedure, as damages for negligence causing the death of the testator. The avails were paid to the executor December 2, 1915. The decree of the surrogate surcharged the account in the sum of \$11,211.45, and directed a distribution of the distributable amount between the testator's widow and his two infant grandchildren. The executor appealed from the part of the decree surcharging the account. The widow appealed from the part directing that the distribution should be shared with the grandchildren. The Appellate Division affirmed the decree.

The decree surcharging the account was based upon the facts: The executor, in retaining a firm of attorneys to prosecute the action, contracted that the compensation

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for their services in the action should be contingent upon and be one-third of the recovery. He paid them from the avails of the judgment, pursuant to the contract, the sum of \$27,345.56, with which payment he credited himself in his account. The fair and reasonable value of their services, as found by the surrogate, was \$15,500; their disbursements were the sum of \$634.21. The executor, therefore, should have paid them the sum of \$16,134.21 only.

We sustain the decree in the surcharge of the account. The surrogate had not the power to allow the executor for any expenditure by him in the action a credit exceeding a just and reasonable sum. When the action was commenced the statute provided: "The compensation of an attorney or counsellor for his services is governed by agreement, express or implied, which is not restrained by law, * * *." (Judiciary Law [Cons. Laws, chapter 30], section 474.) When the accounting proceeding was instituted section 1903 of the Code of Civil Procedure contained the provision that the reasonable expenses of the action to recover damages for a death wrongfully caused may be fixed by the surrogate upon the judicial settlement of the account of the executor or administrator maintaining the action, and may be deducted from the recovery. In this jurisdiction, and others, a contingent fee contract made between client and attorney in retaining the latter is, in the absence of legal fraud, valid. (*Matter of Fitzsimons*, 174 N. Y. 15; *Morehouse v. Brooklyn Heights R. R. Co.*, 123 App. Div. 680; affirmed, 195 N. Y. 537.) When the contract is between the executor or administrator under section 1902 and an attorney, for the purpose of prosecuting or maintaining an action under the section, the law imposes the additional condition that as to the damages recovered, or as to the beneficiaries, the contract is subject to the power of the court to determine the reasonable or suitable compensation or expenditure to the attorney which may be deducted from the

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recovery. The contract, as a matter of law, through implication, includes that rule of law. (*Matter of Reisfeld*, 227 N. Y. 137; *Lee v. Van Voorhis*, 78 Hun, 575; affirmed, 145 N. Y. 603, upon the opinion of HAIGHT, J., below.) In the accounting of the executor, the surrogate shall not adjudge the contract, free from legal fraud, invalid. Whether the contract was at the time it was made fair and reasonable in the matter of compensation to the attorney, depends, in the accounting to the beneficiaries, upon whether or not the compensation it provided and would effect is, in the judgment of the court, under all the conditions, including the uncertainty on the part of the attorney of receiving compensation, a suitable and reasonable expense in the action. The authority of the executor or administrator, defined and delimited by the statute, did not empower him to expend or agree to expend for the compensation a greater sum. An act of his transcending the authority may cause him personal loss or liability — a proposition not presented by the record and with which we do not deal. His contract, made under whatever conditions, is not, as to the beneficiaries of the fund or the court, the test or gauge of the reasonableness of an expense. It was the duty of the executor to employ counsel to prosecute the action. The executor was bound to carry on the litigation, in all respects, with reasonable diligence, prudence and good judgment. The beneficiaries were entitled to the distribution of the recovery, diminished by the expenses warranted by the statute, including those for counsel, in an amount adjudged by the surrogate to be reasonable for the services rendered. We have considered the other several claims of the parties concerning the allowances, or disallowances, by the surrogate, reviewable by us, and deem discussion of any of them unnecessary.

The decree directed the division of the distributable recovery in equal shares among the widow and the two infant grandchildren of the testator. The widow claims

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the entire thereof. A statement here of additional facts is necessary. The testator was injured and died March 28, 1913. He left him surviving a widow and, as his only next of kin, the two infant grandchildren, the children of a deceased daughter. At the time of his death, and at all times subsequent to September 1, 1911, section 1903 of the Code of Civil Procedure contained the provisions: "The damages recovered in an action, brought as prescribed in the last section, are exclusively for the benefit of the decedent's husband or wife, and next of kin; and, when they are collected, they must be distributed by the plaintiff, as if they were unqueathed assets, left in his hands, after payment of all debts, and expenses of administration; subject, however, to the following provisions, to wit: 1. In case the decedent shall have left him surviving a wife or husband, but no children, the damages recovered shall be for the sole benefit of such wife or husband." Those provisions became as we have quoted them through an amendment taking effect September 1, 1911. (Laws of 1911, chapter 122.) Prior to the amendment of 1911 the part of the section we have quoted was: "The damages recovered in an action, brought as prescribed in the last section, are exclusively for the benefit of the decedent's husband or wife, and next of kin; and, when they are collected, they must be distributed by the plaintiff, as if they were unqueathed assets, left in his hands, after payment of all debts, and expenses of administration." The section as it was prior to the amendment of 1911, in connection with other statutes, which we need not quote, would, without question or dispute, have entitled the grandchildren here to share in the distribution.

The surrogate decided that the proper construction of the word "children," in the amendment of 1911 — "in case the decedent shall have left him surviving a wife, or a husband, but no children, the damages recovered

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shall be for the sole benefit of such wife or husband " — signified children generally in a direct line, and was not limited to immediate offspring, and, therefore, the two grandchildren were beneficiaries. The Appellate Division decided that the word had its primary sense of comprehending only the immediate offspring of the decedent and, therefore, did not include the grandchildren, but decided additionally that the amendment of 1911 violated, in the instant case, section 18 of article 1 of the Constitution of the state, adopted in 1894, as follows: "The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation," and, therefore, did not change the section as it was prior to the amendment, under which the grandchildren were beneficiaries.

We approve of the decision of the Appellate Division that the word "children" in the amendment did not include the grandchildren, and the reasoning which supports it. The language of the sections (1902-1905) relating to the action is not in any aspect or application inimical to the primary and common meaning of the term "children" as immediate descendants, or indicative that the term should have the very comprehensive meaning of descendants generally. The reasoning of Mr. Justice SHEARN, concerning this question, in the court below (*Matter of Meng*, 188 App. Div. 69, 77), is sound and comprehensive and we do not repeat or enlarge upon it. The established rule is there well stated: "The word 'children' is always considered to have been used in its primary sense, and to exclude grandchildren, unless there be something in the document in which it occurs, whether statute, will or contract, which requires a different construction. (*Matter of Truslow*, 140 N. Y. 599.)" While the judicial decisions of other jurisdictions are not of convincing effect, they support the decision. (*Hunt v. New Orleans Ry. & Light Co.*, 140 La. 524; *Pittsburgh,*

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The amendment of 1911 does not, because it enacts as we have stated, infract section 18 of article 1 of the Constitution of the state, which became in force January 1, 1895. It did not abrogate the right of action to recover damages for injuries resulting in death as that right existed prior to the adoption of the constitutional provision. The right of action is, of course, and at all times during its existence has been, wholly statutory. At common law a civil action would not lie for causing the death of a human being. Legislative enactments, within constitutional limitations, are the exclusive source and boundary of the liability and the remedy. They may create the cause of action, define the period of its existence, and the party by whom and the method in which it shall be enforced, and prescribe the measure of damages and the beneficiaries. This doctrine is firmly established in the law of this state. The whole subject is covered by the sections of the Code. The concrete question to be answered by us is: Did the amendment of section 1903, adopted in 1911, enacting that the spouse of the decedent should alone, in the absence of children of the decedent, receive the damages, instead of the spouse and the next of kin, abrogate the right of action existing on December 31, 1894, to recover damages for injuries resulting in death. At that date sections 1902-1905 of the Code of Civil Procedure, as then existing, exclusively defined and continued the right of action, and prescribed the measure of damages and the method of the distribution and the distributees of them.

The Constitution interdicts the abrogation of "the right of action now (that is, on December 31, 1894) existing." The right of action then existing was the right to prosecute, with effect, an action to recover damages for

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injuries resulting in death. The right to prosecute, with effect, such action was constituted of the facts which, under the statute, authorized a party to maintain the action against another. The facts which authorize the maintenance of the action constitute the right of action. A right of action existing at any time is not abrogated so long as the facts which give rise to it and which must be proven to maintain it are unchanged. (*Patterson v. Patterson*, 59 N. Y. 574; *Walters v. City of Ottawa*, 240 Ill. 259; *Read v. Brown*, 22 Q. B. Div. 128; *Baltimore & O. R. R. Co. v. Larwill*, 83 Ohio St. 108, 115.)

On December 31, 1894, the section 1902 was: "The executor or administrator of a decedent, who has left, him or her surviving, a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect, or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent, by reason thereof, if death had not ensued. Such an action must be commenced within two years after the decedent's death." Sections 1903, 1904 and 1905 designated as the beneficiaries of the damages the spouse and the next of kin of the decedent, and the measure and distribution of damages. The measure of damages has not been changed. In 1909, by amendment (Laws of 1909, chapter 221), there was added to section 1902 the words: "When the husband, wife or next of kin do not participate in the estate of the decedent, under a will appointing an executor, other than such husband, wife or next of kin, who refuses to bring such action, then such husband, wife or next of kin shall be entitled to have an administrator appointed for the purpose of prosecuting such action for their benefit." In 1915, by amendment (Laws of 1915, chapter 620), there was interpolated in the first sentence of the section immediately following the words "The executor or administrator" the words: "duly appointed in this state, or in

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any other state, territory or district of the United States, or in any foreign country." Section 1903 was amended in 1911 as we have stated; in 1904 (Laws of 1904, chapter 515) in a manner immaterial here, and in 1915 (Laws of 1915, chapter 641), so as to make it applicable to damages obtained through a settlement without action, and so as to declare the original direction of distribution subject to two modifying provisions additional to that enacted in the amendment of 1911.

Manifestly section 1902 declares, and prior to January 1, 1895, declared, the facts from which the right of action arises. The facts declared by it have remained unchanged. The amendments to it have not added to or taken from those facts. Those facts, (a) the death of a human being, (b) caused by the wrongful act, neglect, or default of another, (c) who or which would have been liable to an action in favor of the decedent, by reason thereof, if death had not ensued, (d) a husband, wife or next of kin of the decedent surviving the decedent and, (e) a personal representative of the decedent having been appointed, constituted a right of action to the personal representative. It was thus prior and subsequent to the amendment of 1911. The amendments to section 1902, subsequent to 1894, have not altered those facts from which the right of action has arisen. Whenever, in the trial of the action, those facts have been or are proven and found to exist the representative has maintained the action and has been or is entitled to a judgment for damages. (*Oldfield v. New York & H. R. R. Co.*, 14 N. Y. 310; *Ihl v. Forty-second Street & G. St. F. R. R. Co.*, 47 N. Y. 317; *Murphy v. Erie R. R. Co.*, 202 N. Y. 242.) The right of action existing on December 31, 1894, has not been abrogated or affected by the amendment.

The executor and the grandchildren assert and argue: Prior to the amendment of 1911 the right of action was a collective right of the spouse and next of kin of the

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decedent; the amendment transformed it (no children surviving), into a right of action for the spouse alone; therefore the amendment abrogated the right of action belonging to the next of kin and guaranteed to them by the Constitution. "It is quite clear, therefore," the executor states, "that the amendment to section 1903 does not merely purport to regulate the *distribution* of damages, but purports to limit the *cause of action* by excluding therefrom the right of action which was guaranteed to certain next of kin (in this particular case the testator's grandchildren), by virtue of the constitutional amendment." Therefore, the amendment violates the Constitution and is void. The first proposition of the assertion is erroneous. The right of action was not a right of action of the spouse and next of kin. The statute did not, at the taking effect of section 18, article 1 of the Constitution, vest the right of action in or give it to any of the statutory distributees of the damages recovered. The statute vested the right of action exclusively in the representative of the decedent; it vested the right to the damages exclusively in the spouse and next of kin. It "declares that a right of action arises to the administrator." (*Quin v. Moore*, 15 N. Y. 432, 435.) The statute gives a right of action for the wrongful act "to the representatives of the deceased, for the pecuniary consequences suffered by the husband, wife or next of kin from such wrongful act * * *. The cause of action here provided for does not purport to be in any respect a derivative one, but is an original right conferred by the statute upon representatives for the benefit of beneficiaries, but founded upon a wrong already actionable by existing law in favor of the party injured, for his damages. * * * The cause of action thereby (by the statute) given is not to the estate of the deceased person, but to his or her representatives as trustees, not for the purposes of general administration, but for the

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exclusive use of specified beneficiaries." (*Hegerich v. Keddie*, 99 N. Y. 258, 267.) In *Matter of Meekin v. B. H. R. R. Co.* (164 N. Y. 145, 148) Judge VANN said: "Some confusion has arisen because the statute creates a property right out of the injury to the person, and confers it not upon the one injured but upon his representatives for the benefit of his wife and next of kin." In *Matter of Taylor* (204 N. Y. 135, 139) Judge HAIGHT said: "For many years the statute of this state has given a right of action to the executors or administrators of a decedent who has left him or her surviving a husband, wife or next of kin, to recover damages for the benefit of such husband, wife or next of kin for a wrongful act, neglect or default of any person or corporation by which the decedent's death was caused. * * * The right of action is not given to the widow and next of kin. It is given to the administrator of the decedent for their benefit." The section 1902 so declares. A right of action belongs to or is vested in the person or persons who has or have the lawful right to prosecute it. When a statute creates a liability and prescribes the person who shall have the right to enforce it, the latter is as component a part of the statutory right of action as is the former. The right of the specified person to maintain the action and his existence is as integral in the right of action as the liability of the defendant. (*Crapo v. City of Syracuse*, 183 N. Y. 395; *Usher v. West Jersey R. Co.*, 126 Penn. St. 206.) The right of action here is vested exclusively in the representative. It is a general principle of construction that where a right is given by statute and a remedy provided in the same act the right can be pursued in no other mode. It is obvious that a right of a person who is incapable of presenting it for judicial enforcement is not a right of action. Because the damages which the right of action produces are the property of the statutory distributees and the right to them is a property right (*Matter of Meekin v. Brooklyn Heights R. R. Co.*, 164 N. Y. 145), we, in treating of the

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damages, have in instances spoken of the right of action or the cause of action as the property of the beneficiary or beneficiaries. Our decisions have uniformly been as they must be, in virtue of the language of section 1902 from the time of its enactment, that the right of action is exclusively given and belongs to the representative.

The right to the damages is not a constituent part of the right of action. The ownership of the next of kin, prior to January 1, 1895, of a part of the damages recovered, was not a fact upon which the right of action at all depended. The right of action creates, in conjunction with the remedy, the right to damages. Before the right to damages exists or accrues the right of action must be complete and perfect. Could and should one of several distributees, during the pendency, or prior to the commencement, of the action, release to the defendant or party liable his right to share in the recovery, thus destroying the right, the right of action would not be abrogated or affected. The amount of the damages recoverable might be lessened, but the facts which constituted the right of action and the right would continue. In this statutory action the statutory direction of 1911, changing the recipients of the distribution and continuing to confine them to those for whose benefit the statute, within its clear and expressed intendment, was enacted, did not abrogate the right of action. Inasmuch as the death of the decedent occurred subsequent to the amendment of 1911, the rights of the grandchildren were, obviously, subject to the force of the amendment.

The order of the Appellate Division should be reversed and the decree of the Surrogate's Court modified so as to decree that Elizabeth Bischoff is entitled to and be paid the entire distributable balance of the recovery in the death action with accrued interest thereon, with costs in the Appellate Division and in this court to the special guardian, respondent, payable out of the fund.

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HISCOCK, Ch. J., CHASE, HOGAN, McLAUGHLIN and CRANE, JJ., concur; POUND, J., dissents and votes for affirmance on the ground that the legislative language and policy should not be construed as excluding grandchildren from participating in the recovery.

Order reversed, etc.

BAZENA T. D. MERRIMAN, Respondent, *v.* THE CITY OF NEW YORK, Appellant, Impleaded with Others.

Eminent domain — New York (city of) — award in condemnation proceedings instituted to acquire land for municipal purposes — when such award has been duly confirmed by the courts and the award paid as directed therein, a mortgagee who has failed to present and prove her claim thereunder cannot maintain an action against the city to recover the mortgage debt.

1. An award payable by a municipality is a sure and certain provision for the payment of compensation for the real estate for which the award is made, and stands in place of the real estate for the purpose of determining in equity the rights of the owners. The real estate acquired in the proceeding instituted for that purpose is obtained entirely free from the claims of all owners including all persons having an interest therein, either legal or equitable.

2. It is provided that all contracts and engagements respecting property taken in the proceeding in which an award is made on behalf of the city of New York to acquire title to land, shall, upon such vesting of title in the city, cease, determine and be absolutely discharged as to the part thereof so taken. (Greater New York Charter, L. 1901, ch. 466, § 996.) The charter also provides that all damages awarded by the commissioners of estimate and assessment shall be paid by the city of New York to the respective persons mentioned or referred to in their report. (§ 1001.) It is further provided that the determination of the court on the final confirmation of the report "shall, unless set aside or reversed on appeal, be final and conclusive, as well upon the city of New York as upon the owners, lessees, persons, and parties interested and entitled unto the lands, tenements, hereditaments and premises mentioned in the said report; and also upon all other persons whomsoever." (§ 986.) As the result of these and other provisions, where all of the requirements of the charter relating

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to the taking of lands for street purposes were complied with by the city, and a party holding a mortgage on the property condemned never served a notice in writing or otherwise as provided by the charter of any claim by her as the owner of the real estate as in the charter defined and never appeared in the proceeding or asserted any claim therein whatsoever, she wholly defaulted in asserting a claim for damages by reason of taking the property, and in such case the city was authorized to pay the award to the person to whom it was directed to be paid by the order of confirmation and is protected in making such payment as against a claim upon the award made by the mortgagee.

Merriman v. City of New York, 185 App. Div. 888, reversed.

(Submitted October 13, 1919; decided November 25, 1919.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 19, 1918, unanimously affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

William P. Burr, Corporation Counsel (*Joel J. Squier* of counsel), for appellant. The trial court erred in finding, as a matter of law, that the city of New York was negligent in the preparation of the final report of the commissioners, which failed to recite the mortgage as a lien on the award and also negligent in paying the award without regard to the mortgage. (*Matter of Mayor, etc.*, 99 N. Y. 570.) The trial court erred in finding as a matter of law that the city of New York is obligated to plaintiff for the amount of her deficiency judgment. (*Matter of City of New York*, 209 N. Y. 127; *Youngs v. Stoddard*, 27 App. Div. 162; *Matter of Corporation Counsel*, 42 App. Div. 198.)

Theodore E. Larson and *Henry T. Randall* for respondent. Upon the making of the award plaintiff's lien on the land was transferred to the fund for the payment of the award to the extent of the deficiency.

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judgment. (*Hill v. Wein*, 35 App. Div. 520; *Utter v. Richmond*, 112 N. Y. 610; *Matter of Mayor, etc.*, 118 App. Div. 117; *Bank of Auburn v. Roberts*, 44 N. Y. 192; *Youngs v. Stoddard*, 27 App. Div. 162; *Deering v. Schreyer*, 171 N. Y. 451; *Magee v. Brooklyn*, 144 N. Y. 265.) By paying the amount of the award to Carolina Wenninger after notice of plaintiff's mortgage lien the city failed in its duty toward plaintiff and became obligated to make restitution by satisfying plaintiff's lien as determined by the deficiency judgment. (*Hatch v. Mayor, etc.*, 82 N. Y. 436.) The payment of the award is no defense to the action. (*Matter of Corporation Counsel*, 42 App. Div. 198; *Matter of City of New York*, 209 N. Y. 127.)

CHASE, J. In 1899 and prior thereto Katharine F. Merritt owned certain lands in the city of New York. On November 14 of that year she gave to the plaintiff a mortgage covering said lands to secure the payment of \$7,000 which mortgage was duly recorded.

In 1906 the city of New York duly instituted a proceeding to acquire title to lands required for the purpose of opening and extending Belmont avenue. The lands sought to be taken included a portion of the lands covered by the plaintiff's mortgage and the part so taken is known in the proceeding as "damage parcel No. 3." Commissioners were duly appointed in the proceeding and on March 1, 1907, pursuant to a resolution of the board of estimate and apportionment, title to lands including said "damage parcel No. 3," became vested in fee in the city of New York.

On December 3, 1907, a preliminary report of the commissioners was duly made and filed. In and by such report an award of \$3,999.00 was made to "unknown owners" for the damages sustained on account of the taking of said "damage parcel No. 3." At the time title in fee to said "damage parcel No. 3" became so vested in the city of New York Carolina Wenninger was the

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owner in fee thereof, the same having been transferred and sold to her through mesne conveyances from Katharine F. Merritt.

On January 28, 1908, at a meeting of the commissioners duly called to hear objections to their preliminary report, counsel for Carolina Wenninger in proof of her title to "damage parcel No. 3" offered in evidence an affidavit made by her, which was received by the commissioners, in which she alleged that she was the owner of the lands known as "damage parcel No. 3" and in which she also alleged that the same were subject to a mortgage to the plaintiff, and she therein stated the date and date of record thereof. The final report of the commissioners which was filed January 2, 1909, provided for the payment of the award and interest thereon to Carolina Wenninger and did not refer to or make any provision for the payment of the plaintiff's mortgage. On August 7, 1909, the final report of the commissioners was duly confirmed by the court.

On January 3, 1910, the plaintiff commenced an action to foreclose her mortgage, making the city of New York a party defendant thereto. The complaint did not contain an allegation relating in any way to the city of New York except the general allegation that the interest of the defendants, if any, in the real property therein described, accrued subsequent to that of the plaintiff. On March 22, 1910, the city of New York appeared in the action by the corporation counsel. The defendant Mulligan in this action appeared in the foreclosure action as a defendant and also as attorney for various other defendants.

While the foreclosure action was pending and on the 17th of May, 1910, Carolina Wenninger appeared at the office of the comptroller of the city of New York in company with her attorney, the defendant Mulligan, and her counsel, the defendant St. John, and made a demand for payment to her of the award and filed with the comptroller

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an affidavit in which she alleged falsely that there were no mortgages or liens of any nature whatsoever upon the lands embraced within "damage parcel No. 3." The comptroller paid to her the award with interest amounting to \$4,786.58. She paid the same to her said attorney from which he paid her counsel, St. John, a bill for services as counsel in the condemnation proceeding and retained the residue. St. John received the amount paid to him in good faith, believing that the allegations of the affidavit were true. Mulligan received the amount paid to him knowing that the affidavit of his client was false and retained the same with intent to defeat the plaintiff's lien, if any, thereon.

On June 13, 1911, judgment of foreclosure and sale was entered in plaintiff's action which did not affect the defendant city of New York as it simply directed the sale of that part of the mortgaged premises not including "damage parcel No. 3." A sale was had accordingly which resulted in a partial payment on account of the plaintiff's mortgage and a judgment of \$2,044.35 for deficiency was rendered against Katharine F. Merritt, the mortgagor, in favor of the plaintiff. Execution was issued on that judgment and returned unsatisfied. The said Carolina Wenninger has since died intestate and insolvent. The said Mulligan is insolvent. The said St. John has repaid to the use of the plaintiff the money received by him from Mulligan.

On April 6, 1915, the plaintiff presented to the comptroller of the city of New York a written demand for the payment of the said deficiency judgment but the same has not been paid. The plaintiff brought a proceeding by petition to compel the comptroller to pay the amount of the deficiency judgment to her out of the award. The petition was denied on the ground that plaintiff's only remedy was by an action under section 1001 of the present Greater New York charter. The order of the Special Term was affirmed at the Appellate Division

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(*Matter of City of New York*, 172 App. Div. 952) and in this court "without prejudice to the petitioner's remedy by action against the city or against Caroline Wenninger." (*Matter of City of New York, Belmont Ave.*, 218 N. Y. 721.) This action is brought against the city of New York and against Mulligan and St. John.

The trial court adjudged that the defendant Mulligan refund and repay to the plaintiff the amount of her deficiency judgment less the amount repaid to her by the said St. John with the costs of the action, and further adjudged that in the event that execution against the property of Mulligan be returned wholly or partly unsatisfied or said judgment remain unsatisfied for sixty days the defendant city of New York pay the amount thereof to the plaintiff and that the plaintiff have judgment against the city therefor. The complaint was dismissed as against the defendant St. John. The city of New York appealed to the Appellate Division from the judgment as against it and the judgment was by that court unanimously affirmed. (*Merriman v. City of New York*, 185 App. Div. 888.)

The plaintiff in bringing this action for the purposes alleged in her complaint necessarily affirms the title acquired by the city of New York to "damage parcel No. 3." The final order of confirmation of the commissioners' report is conclusive upon the parties of whom jurisdiction was obtained in the proceeding at least as to the condemnation of the land and the amount of the award. (*Matter of Department of Parks*, 73 N. Y. 560; *Youngs v. Stoddard*, 27 App. Div. 162.)

The provisions of the charter of the city of New York by which the fee of real property is taken for street purposes are constitutional. (*Matter of Mayor, etc., City of N. Y.*, 99 N. Y. 569.)

The constructive notices provided by the charter are sufficient to constitute due process of law as against the owners of such real property. (*Matter of Mayor, etc., supra.*)

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The proceeding to acquire title for the purpose of opening and extending Belmont avenue was commenced and concluded while the Greater New York charter enacted in 1901 (Laws of 1901, chapter 466) was in force. Our references are to that charter.

The term "real estate" as used in the charter embraces "All uplands, * * * and every estate, interest and right, legal and equitable, in lands or water, or any privilege or easement thereunder, including terms for years, and liens thereon by way of judgment, mortgages or otherwise, and also all claims for damage to such real estate." (Greater N. Y. Charter, sec. 485.) The real estate so acquired in the proceeding included the plaintiff's lien by mortgage on said "damage parcel No. 3." She was an owner within the meaning of the charter.

An award payable by a municipality is a sure and certain provision for the payment of compensation for the real estate for which the award is made. And it stands in place of the real estate for the purpose of determining in equity the rights of the owners. By the proceeding the real estate acquired in the proceeding was obtained entirely free from the claims of all owners including all persons having an interest therein either legal or equitable. (*Matter of City of Rochester*, 136 N. Y. 83.)

Where a part of any lot or parcel of land or other premises is taken for street purposes, "All contracts and engagements respecting the same shall, upon such vesting of title, cease, determine and be absolutely discharged as to the part thereof so taken." (Greater New York Charter, sec. 996.) Such provision is valid. (*Matter of Mayor, etc., supra*; Lewis on Eminent Domain, 1260.)

The charter also provides that all damages awarded by the commissioners of estimate and assessment shall be paid by the city of New York to the respective persons mentioned or referred to in their report. (Greater New York Charter, sec. 1001.)

After the commissioners are appointed they are required

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by the charter to publish a notice of their appointment " Containing a brief statement of the purposes for which they have been appointed, and requiring all parties and persons interested in the real estate taken or to be taken * * * and having any claim or demand on account thereof, to present the same to them duly verified, with such affidavit or other proof as the owners or claimants may desire, within twenty days after the date of such notice, and stating a time and place after the expiration of said twenty days when the said parties and persons shall be heard in relation thereto by the said commissioners." (Greater New York Charter, sec. 978.) After the hearing as provided by the notice the commissioners are required to ascertain and estimate the compensation which ought justly to be made by the city of New York " To the respective owners, lessees, parties and persons respectively entitled unto or interested in the lands." (Greater New York Charter, sec. 980.)

At least thirty days before their report is presented to the court for confirmation an abstract of their estimate and assessment is required to be deposited as by the charter provided and notice given to all persons interested in the proceeding or in any of the lands affected thereby who have objections thereto, to file the same in writing duly verified with the commissioners and that a hearing will be had on a day specified by the commissioners of all parties so objecting to the abstract. (Greater New York Charter, sec. 981.)

After making any corrections or alterations in their estimates and assessments, if any, the commissioners are required to file their report in the court for confirmation. (Greater New York Charter, sec. 984.)

At the hearing before the court on the application for confirmation all persons interested therein may be heard and the determination of the court on the final confirmation of the report " shall, unless set aside or reversed on appeal, be final and conclusive, as well upon the city of

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New York as upon the owners, lessees, persons, and parties interested and entitled unto the lands, tenements, hereditaments and premises mentioned in the said report; and also upon all other persons whomsoever." (Greater New York Charter, sec. 986.)

All of the requirements of the charter relating to the taking of lands for street purposes were so far as appears complied with by the city. The plaintiff in this action never served a notice in writing or otherwise as provided by the charter or otherwise, of any claim by her as the owner of the real estate as in the charter defined and never appeared in the proceeding or asserted any claim therein whatsoever.

She wholly defaulted in asserting a claim for damages by reason of taking "damage parcel No. 3," or to the award. The amount of the award was paid to the person named in the report of the commissioners as confirmed by the court. No actual notice of a claim by the plaintiff to damages for taking "damage parcel No. 3" or to the award ever came to the city of New York.

A constructive or actual notice of facts upon which, peradventure, an equitable claim could be asserted to damages or to an award, is a long way from constructive or actual notice that a claim is asserted by an owner of an interest in the real estate taken or in the award. The purpose of the charter provisions is to obtain title in fee to the lands to be used for street purposes free and clear from all rights or interests therein. It leaves to the owners the right and the duty if they claim a legal or equitable interest in the award to present the same duly verified as by the charter provided. A person having an interest in lands taken under the charter through holding a mortgage thereon might be willing to retain the lien on the lands other than those taken in the proceeding without asserting any claim to the award made as compensation for the real estate so taken. It is possible also that a mortgage appearing of record or by the evidence

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taken before the commissioners as outstanding might be paid after the commencement of the proceeding and the confirmation of the award, or the time when the person named in the report and order of confirmation demands the award. Such might well have been the conclusion from the affidavit of Carolina Wenninger filed at the time she made her demand for payment of the award in which she alleged that there were no mortgages or other incumbrances on said "damage parcel No. 3." When the award was paid no claim by the mortgagee had been filed as provided by the charter or otherwise, and there is no finding herein of collusion, fraud or bad faith on the part of the comptroller acting in behalf of the city.

If the city is not protected by the charter provisions relating to claims of owners and the necessity of filing the same as by the charter provided, it will be required at its peril to bring all persons having claims, legal or equitable, against the lands taken in the proceeding or at least all persons of which it has notice, actual or constructive, or of facts which should place it upon inquiry relating to such claims before the court, in some other way than as now provided by the charter, that it may be there determined to whom the award shall be paid. Such further and additional or supplemental action is one of the very things apparently sought to be avoided by the charter.

The provisions of the charter do not prevent the maintenance of an action in equity against the city before the award is paid by it pursuant to its provisions, by one claiming an interest therein which has not been finally determined and adjudicated, in which action the person or persons to whom the award is by the decree payable and any other person or persons claiming an interest therein can be made parties, for the purpose of establishing among all the parties thereto their respective rights and interests, legal and equitable, in such award and directing payment thereof accordingly.

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This action, however, was not brought until long after the award had been paid to the owner as named in the report and order of confirmation. It wholly depends upon an asserted liability arising from an alleged actual or constructive notice that the plaintiff had a mortgage of record covering "damage parcel No. 3," without any proof of a claim made by her by reason thereof prior to the award having been paid in accordance with the report of the commissioners duly confirmed by the court.

The question here involved was before the Supreme Court in a case entitled *Matter of Sea Beach Railway Co.*, and is reported in 148 N. Y. Supp. 1080 and the decision therein was affirmed on appeal to the Appellate Division (*Matter of Sea Beach Railway Co.*, 121 App. Div. 907) and on appeal to this court (*Matter of Sea Beach Railway Co.*, 196 N. Y. 533). In that case the railway company made application to the comptroller to pay to it an award for two pieces of real property taken from it pursuant to the city charter for street purposes in the city of New York. The comptroller refused to pay the award on the ground that there was a mortgage of \$650,000 on the property of the railroad company including the real property taken for street purposes. The trustee of the mortgage bond-holders had made no claim for the amount of the award, neither had it formally waived or released the same. The court at Special Term held in substance that where a mortgagee of lands sought to be condemned for street purposes does not assert a claim to any part of the award and does not file a notice making claim thereto, the owner of the fee is entitled to receive payment of the award in full and the comptroller cannot refuse to pay the same to the owner of the fee because he has actual knowledge that a mortgage existed upon the real property taken at the time the fee thereof passed to the city. The case is in every respect similar to the one now before us. The

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fact that the amount of the award in that case was small in proportion to the amount of the mortgage does not affect the principle involved. We repeat that the purpose of the charter provisions is to obtain title to the lands required for street purposes free from all claims thereto either legal or equitable and to enable the city to pay the amount of the award to the owners thereof as named in the commissioners' report and the order of the court confirming the same.

The purpose of the charter provisions as they existed prior to 1915 is emphasized in the charter of the city as it was changed by chapter 606 of the Laws of 1915. (See sections 969 to 1016.)

It is therein, among other things, expressly provided: "Payment of an award to a person named in the final decree of the court or the report of the commissioners as the case may be, as the owner thereof, if not under legal disability, shall, in the absence of *notice in writing to the comptroller* of adverse claims thereto, protect the city." (Greater New York Charter, sec. 983.)

The plaintiff, having wholly failed to assert her claim prior to the award being paid by the comptroller to the owner of the fee to whom it was awarded by the report and order of confirmation, is not entitled to maintain this action as against the city.

The judgment as against the city of New York should be reversed and the complaint as against it dismissed, with costs in all courts.

HISCOCK, Ch. J., COLLIN, CARDOZO, POUND, CRANE and ANDREWS, JJ., concur.

Judgments reversed, etc.

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STEPHEN McNAMARA, as Administrator of the Estate of PHILIP McNAMARA, Deceased, Respondent, *v.* ABRAHAM LEIPZIG, Appellant, Impleaded with Another.

Master and servant — negligence — automobiles — chauffeur, hired and paid by garage company to operate automobile rented by company for a fixed period at a fixed rental for the use of the lessee, not the servant of the lessee.

1. A servant lent or let by his master to another does not become the servant of the other because the other directs what work is to be done or in what way it is to be done. If the servant remains subject to the general orders of the person who hires and pays him he is still his servant, although specific directions may be given him by the other, from time to time, as to the work to be done.

2. Where a garage company by a written agreement rented an automobile and the services of a chauffeur to defendant for a certain term and for a designated sum, to convey defendant wherever he desired to go, the company to hire and pay the chauffeur, to pay all expenses of the maintenance and operation of the car and to provide insurance protecting the defendant from all liability by reason of accident, such chauffeur was not the servant of defendant nor did the relation of principal and agent exist. The chauffeur was the servant of the company in its undertaking to furnish an automobile for the use of the defendant and to carry out the company's work under the agreement. The defendant had no authority, management or care over the automobile or as to the manner in which it should be driven, and the chauffeur did the company's business in his own way, and the orders given him by defendant merely stated to him the work which the company had arranged to do. It follows, therefore, that defendant is not liable for the death of a pedestrian caused by the negligence of the chauffeur in driving the automobile in which defendant was riding.

Mc Namara v. Leipzig, 180 App. Div. 515, reversed.

(Submitted October, 23 1919; decided November 25, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 24, 1917, affirming a judgment in favor of plaintiff entered upon a verdict.

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The nature of the action and the facts, so far as material, are stated in the opinion.

Joseph Force Crater and Alfred W. Meldon for appellant. The trial court erred in denying the defendant's motion to dismiss the complaint upon the ground that the plaintiff had failed to establish that the driver of the automobile was the servant of the defendant at the time of the accident, and in submitting that question to the jury. (*Schmedes v. Deffaa*, 214 N. Y. 675; *Higgins v. W. U. Tel. Co.*, 156 N. Y. 75; *Standard Oil Co. v. Anderson*, 212 U. S. 215; *Maxmilian v. Mayor, etc.*, 62 N. Y. 160; *Kellogg v. Church Charity Foundation*, 203 N. Y. 191; *Lee v. Crawford Co.*, 182 App. Div. 191; *Weaver v. Jackson*, 153 App. Div. 661; *Cannon v. Fargo*, 222 N. Y. 329; *Driscoll v. Towle*, 181 Mass. 416; *Loughran v. Antophone Co.*, 77 App. Div. 542.)

William S. Evans for respondent. Duffy was, at the time of the accident, under the direction and control of defendant and was, therefore, his servant as a matter of law. (*Hartell v. Simonson & Son Co.*, 218 N. Y. 345; *Schmedes v. Deffaa*, 153 App. Div. 819; 214 N. Y. 675; *Standard Oil Co. v. Anderson*, 212 U. S. 215; *Howard v. Ludwig*, 171 N. Y. 507; *Wirth v. G. R. Signal Co.*, 136 App. Div. 536; *Higgins v. W. U. Tel. Co.*, 156 N. Y. 75; *McInerney v. D. & H. C. Co.*, 151 N. Y. 411; *Muldoon v. City Fireproofing Co.*, 134 App. Div. 453; *Callahan v. Munson S. S. Co.*, 141 App. Div. 791; *McCarthy v. McCabe*, 131 App. Div. 396.)

COLLIN, J. The action is to recover damages for the alleged negligence of the defendant by which the death of plaintiff's intestate was caused. (Code of Civil Procedure, sections 1902-1905.) The judgment of the Trial Term consequent upon the verdict in favor of the plaintiff was affirmed by the non-unanimous decision of the Appellate Division.

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Under the exceptions and the briefs of counsel the appeal presents the single question whether or not the evidence tended to prove the liability of the defendant for the negligence of the chauffeur in so driving the automobile, in which the defendant was, against the plaintiff's intestate as to cause his death. The evidence concerning the question is harmonious and without contradiction. The defendant was in the automobile under the conditions: an agreement in writing existed between the Concord Garage Company, the owner, or the representative of the owner, of the automobile, and the defendant, whereby the company rented the automobile and the services of the chauffeur to the defendant for the term of three months, to be used by him during the term at any hour of the day or night he desired; the company agreed "to engage and furnish a chauffeur to operate and run said automobile during said period at its own cost and expense" and "to pay all expenses for gasoline used in propelling said automobile, together with any and all expenses for repairs or supplies used in said automobile;" also, to procure insurance covering the defendant from all liability by reason of accidents, injuries of any kind or from any cause whatsoever; the defendant agreed "to pay for the use of the aforesaid automobile and services of a chauffeur during the period" a designated sum. The performance of the agreement had been entered upon and was being carried out at the time of the accident. In the performance the defendant exercised no control in the selection of the chauffeur, or over him, his wages or the car, other than to direct him when and where to come with the car for the defendant and where to transport him. The car when not in the use of the defendant was kept in the garage of the company, was there cared for and supplied with the necessities by the company and there the chauffeur received calls of the defendant for the use of the car and the chauffeur. In the matters of coming to and leaving

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the defendant and of taking him to the places directed by him the chauffeur was under his directions. The defendant paid for the chauffeur's luncheon when using him at luncheon time and paid the cost of having the car watched when in the defendant's use and it was necessary for the chauffeur as well as defendant to leave it unattended. The accident happened upon a street specifically designated by defendant to be taken by the chauffeur.

In virtue of those facts this case falls into a class concerning which established legal principles are applicable and decisive. The defendant was not liable for the death of the intestate unless the facts tended to prove that the negligent chauffeur in driving was in a legal sense a servant of the defendant. There is not evidence that the defendant actively interfered with and caused the manner of driving, or had knowledge or notice that the chauffeur was incompetent or careless. It was essential, therefore, in order to establish a liability against the defendant that the relation of principal and agent, or that of master and servant, should exist. (*King v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 181; *Stevens v. Armstrong*, 6 N. Y. 435.) The relation of principal and agent obviously did not exist. The liability of the defendant depends on the doctrine of the liability of a master for the acts of his servant done in the course of his employment. The relation of master and servant is created by contract, express or implied. Of the elements which may constitute it, those that the servant must, in the course of the employment, be doing the work of the master under the will, direction and control of the master throughout all the details of the work, are essential. (*Schmedes v. Deffaa*, 214 N. Y. 675, decided upon the dissenting opinion of MILLER, J., in the court below, 153 App. Div. 819; *Higgins v. Western Union Tel. Co.*, 156 N. Y. 75; *Scribner's Case*, 231 Mass. 132; *Butler v. Townsend*, 126 N. Y. 105.) A servant may,

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with his consent, through the agreement of his master, become for the occasion and time and to the extent agreed upon the servant of another. A master may loan or let to another a servant in his general employment, with the consent of the servant, as he may his implements, in such manner that the servant does the work of the other under the other's exclusive control and, therefore, is for the occasion and time the servant of the other. On the other hand, the master may agree with another that the master shall himself perform the work of the other through his own servant, the master retaining the service, direction and control of the servant. To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed. (*Schmedes v. Deffaa*, 214 N. Y. 675; *Hartell v. Simonson & Son Co.*, 218 N. Y. 345; *Standard Oil Company v. Anderson*, 212 U. S. 215; *Donovan v. Laing, Wharton & Down Const. Syndicate*, [1893] 1 Q. B. 629.) In the *Hartell* case Judge CUDDEBACK said: "A servant in the general employment of one person, who is temporarily loaned to another person to do the latter's work, becomes, for the time being, the servant of the borrower, who is liable for his negligence. But if the general employer enters into a contract to do the work of another, as an independent contractor, his servants do not become the servants of the person with whom he thus contracts, and the latter is not liable for their negligence." (p. 349.) A servant lent or let by his master to another does not become the servant of the other because the other directs what work is to be done or in what way it is to be done. If the servant remains subject to the general orders of the person who hires and pays him he is still his servant, although specific directions may be given him by the other from time to time as to the work to be done. The other person has the right to exercise the degree of control of the servant essential to secure the fulfillment of the agreement

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between the master and himself. (*Johnson v. Netherlands Am. Steam Navigation Co.*, 132 N. Y. 576; *Standard Oil Co. v. Anderson*, 212 U. S. 215, 226; *Quinby Co. v. Estey*, 221 Mass. 56.)

Those principles have been frequently applied to the letting or hiring of a carriage or wagon with horses and a driver to be used for the conveyance of the hirer or his property from place to place. The judicial decisions hold clearly and almost uniformly that in the care and management of the horses and vehicle, the driver does not become the servant of the hirer, but remains subject to the control of the general employer, and that, therefore, the hirer is not liable for his negligence in driving. (*Kellogg v. Church Charity Foundation*, 203 N. Y. 191; *Little v. Hackett*, 116 U. S. 366, 379; *Quarman v. Burnett*, 6 Mees. & Wels. 499; *Hussey v. Franey*, 205 Mass. 413; *Corliss v. Keown*, 207 Mass. 149; *Peach v. Bruno*, 224 Mass. 447; *Driscoll v. Towle*, 181 Mass. 416; *Fenner v. Crips Bros.*, 109 Iowa, 455; *Sacker v. Waddell*, 98 Md. 43; *Frerker v. Nicholson*, 41 Colo. 12.) The vehicles with the horses and driver are let with the implied understanding that the driver remained the servant of the owner, and as such had the management of the property and exercised care and control over it. The driver and the property are engaged in the owner's business and subject to his management, direction and control. It is inherent in and a part of that business that the person being transported should have the power of direction as to where and when he should be taken.

The same rule is applied to the letting of an automobile and a chauffeur. (*Shepard v. Jacobs*, 204 Mass. 110; *Wallace v. Keystone Automobile Co.*, 239 Penn. St. 110; *Gerretson v. Rambler Garage Co.*, 149 Wis. 528.)

In the present case the written agreement defines the relation and liabilities of the parties. It gave for a consideration to the defendant the use, at demand, of the automobile and a chauffeur to operate and run it for a

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certain period. The company possessed, managed, cared for and supplied the automobile and selected, employed and controlled the chauffeur, who operated the car for it. The extent of the defendant's control was to direct the chauffeur when and where to come with the automobile, where to go and where to stop. In obeying those directions the chauffeur was carrying out the company's work under the agreement. The defendant had no authority, management or care over the automobile or as to the manner in which it should be treated or driven. The chauffeur did the company's business in his own way and the orders given him by the defendant merely stated to him the work which the company had arranged to do.

The judgment should be reversed and the complaint dismissed, with costs in all the courts.

HOGAN, CARDOZO and CRANE, JJ., concur; HISCOCK, Ch. J., CHASE and ANDREWS, JJ., dissent.

Judgment reversed, etc.

In the Matter of the Application of DAVID HIRSHFIELD, as Commissioner of Accounts of the City of New York, Appellant, for a Warrant of Attachment against HENRY R. M. COOK, Respondent.

New York (city of) — board of education of city — division of authority and responsibility, as to public schools, between such board and state department of education — sections 96 and 108 of Greater New York charter not repealed by chapter 786 of Laws of 1917 — power of commissioner of accounts to examine accounts of board of education — when attachment will issue against witness who refused to obey a subpoena under ruling of state commissioner of education advising him so to do.

1. Although public education is a state and not a municipal function, some part of its administration may by the state be committed to a municipality and to a board of education as a department

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of such municipality, and its administration will thus rest upon a specified and prescribed division of authority and responsibility between such representatives of the state and officers of the state education department representing the state.

2. Chapter 786 of the Laws of 1917 (Education Law, art. 33a; Cons. L. chap. 16) did not expressly repeal that part of section 96 of the Greater New York charter which provides that the department of education shall be an administrative department of said city; nor section 108 thereof which provides that the head of the department of education shall be called the board of education. From a consideration of the provisions of the charter that concededly have not been repealed and of the provisions of the act of 1917, some of which are herein mentioned, and of section 1618 of the charter, it cannot be held that it was the unmistakable intention of the legislature to repeal said sections so far as they relate to the board of education.

3. While the educational affairs in the city of New York are under the general management and control of the board of education, such board is subject to municipal control in matters not strictly educational or pedagogic. The city is given supervisory authority over the amount of expenditures in the city for school purposes, whenever they exceed four and nine-tenths mills on every dollar of the assessed valuation of the real and personal property in the city liable to taxation. The responsibility of determining the amount of money to be spent by the board of education over and above the prescribed amount as stated has been left to the city and not to the education department of the state or its agencies as such, and that duty on the part of the city includes the duty of ascertaining the facts upon which its responsibility should be exercised. One of the ways provided by the charter for eliciting information for use in behalf of the city is an examination to be conducted pursuant to section 119 of the charter, and in so doing the commissioner of accounts, who is charged with that duty (Charter, § 119), has full power to compel the attendance of witnesses; and where the commissioner of accounts issued a subpoena to the auditor of the board of education, requiring him to appear and testify upon an investigation of the accounts of the board of education, and the auditor, under the advice and direction of the state commissioner of education, refused to obey the subpoena, a warrant of attachment should be issued to compel his attendance.

Matter of Hirshfield v. Cook, 188 App. Div. 843, reversed.

(Argued October 1, 1919; decided December 2, 1919.)

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APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 3, 1919, which reversed an order of Special Term granting a motion for a warrant of attachment.

The nature of the proceeding and the facts, so far as material, are stated in the opinion.

William P. Burr, Corporation Counsel (John F. O'Brien, William E. C. Mayer and John Lehman of counsel), for appellant. Both as an administrative department of the city and as a body empowered to expend moneys raised by taxation in the city of New York, the department of education is subject to investigation by municipal authorities with respect to such expenditures. (*Gunnison v. Bd. of Education*, 176 N. Y. 11; *Hogan v. Bd. of Education*, 200 N. Y. 370; *Smith v. Bd. of Education*, 208 N. Y. 84; *Titusville Iron Co. v. City of New York*, 207 N. Y. 203; *Clarke Co. v. Bd. of Education*, 156 App. Div. 842; 215 N. Y. 646; *Matter of Dobrovolny v. Prendergast*, 219 N. Y. 280; *People ex rel. Crammond v. Rome*, 136 N. Y. 489; *People ex rel. Conde v. Meyers*, 161 App. Div. 315; *People ex rel. Burnet v. Jackson*, 85 N. Y. 541; *Matter of Flaherty v. Craig*, 226 N. Y. 76.) The creation of the territory embraced within the city as a school district does not alter the situation. (*Pasadena School Dist. v. Pasadena*, Annp. Cas. 1915B, 1039.) The jurisdiction of the state education department in no way conflicts with the power of the municipal authorities to examine the accounts of the board of education with respect to its expenditures of moneys raised by taxation. (*People ex rel. Bd. of Education v. Finley*, 211 N. Y. 51; *People ex rel. Light v. Skinner*, 159 N. Y. 162.)

Morton Stein for respondent. The commissioner of accounts has no jurisdiction over the so-called subject-matter of his proposed investigation. The board of education is neither a city nor county department.

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(*Matter of Foster*, 139 App. Div. 769; *Miller v. Tayntor*, 170 App. Div. 126; *People ex rel. Hylan v. Finegan*, 187 App. Div. 737; 105 Misc. Rep. 685; *McDonald v. Keeler*, 99 N. Y. 463; *Harriman Case*, 211 U. S. 407; *Bullock v. Cooley*, 225 N. Y. 566; *People ex rel. Bd. of Education v. Finley*, 211 N. Y. 51.)

Frank B. Gilbert for commissioner of education and regents of the university of the state of New York. The department of education of the city of New York is not a department of the city government; the board of education and its officers and employees are not city officers; the commissioner of accounts has no power to conduct a special examination of the accounts and methods of the department of education or any of its officers. (*Gunnison v. Bd. of Education*, 176 N. Y. 11; *Matter of Hertle*, 120 App. Div. 717; *Miller v. Tayntor*, 170 App. Div. 126; *Titusville Iron Co. v. City of New York*, 207 N. Y. 203; *Ackley v. Bd. of Education*, 174 App. Div. 44.) The power of examination and investigation of the board of education of the city of New York is vested exclusively in the education department of the state, to be exercised by the commissioner of education or by the regents of the university. (*Hutchinson v. Skinner*, 21 Misc. Rep. 729; *Miller v. Tayntor*, 170 App. Div. 126.)

CHASE, J. The appellant holds his office by appointment pursuant to section 119 of the charter of the city of New York (L. 1901, ch. 466, amd. L. 1916, ch. 517) which provides, "The mayor shall appoint and remove at pleasure a commissioner of accounts." The power and authority of the commissioner of accounts is defined by that section. It is therein provided:

" * * * * It shall be the duty of the commissioner of accounts, once in three months, to make an examination of the receipts and disbursements in the offices of the comp-

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*troller and chamberlain, in connection with those of all the departments and officers making returns thereto, and report to the mayor a detailed and classified statement of the financial condition of the city as shown by such examinations. He shall also make such special examinations of the accounts and methods of the departments and offices of the city and of the counties of New York, Richmond, Queens, Kings and Bronx, as the mayor may from time to time direct, and such other examinations as the said commissioner may deem for the best interests of the city, and report to the mayor and the board of aldermen the results thereof. For the purpose of ascertaining facts in connection with these examinations he shall have full power to compel the attendance of witnesses, * * *."*

The provisions of that section of the charter are not unconstitutional as conferring judicial powers. (*Matter of Herile*, 120 App. Div. 717; affd., 190 N. Y. 531.)

Public education is a state and not a municipal function. Boards of education are branches of the state government charged by the state with the administration of its educational system. (*Ham v. Mayor, etc., of N. Y.*, 70 N. Y. 459; *Gunnison v. Board of Education, N. Y.*, 176 N. Y. 11; *Schieffelin v. Komfort*, 212 N. Y. 520; *Smith v. Board of Education, N. Y.*, 208 N. Y. 84, 87.) Although public education is a state and not a municipal function, some part of its administration may by the state be committed to a municipality and to a board of education as a department of such municipality, and its administration will thus rest upon a specified and prescribed division of authority and responsibility between such representatives of the state, and officers of the state education department representing the state.

The board of education in the city of New York, speaking in general terms, stands as a substitute for the latter as a corporate agency of the state for the purpose of administering educational matters. (*Smith v. Board of Education, supra.*)

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Prior to the passage of chapter 786 of the Laws of 1917 the administration of public education in the city of New York was of a dual character. (*Clarke Co. v. Board of Education*, N. Y., 156 App. Div. 842; affd., 215 N. Y. 646; *Matter of Dobrovolny v. Prendergast*, 219 N. Y. 280.)

To a limited extent a duality of authority exists between the city and its water department (*Oakes Mfg. Co. v. City of New York*, 206 N. Y. 221), and the county clerk as a public official (*People ex rel. Plancon v. Prendergast*, 219 N. Y. 252), and the justices of the Supreme Court as officers charged with the duty of incurring obligations payable out of the money raised by taxation. (*Matter of Flaherty v. Craig*, 226 N. Y. 76.) That the board of education prior to the act of 1917 was at least in some of its duties an administrative department of the city of New York, is substantially conceded. The contention of the respondent on this appeal is that the administration of the school system, a state function, is now wholly retained by it and that it has not delegated any of its authority to the municipality either directly or through a department thereof. The question arises in this case through an effort on the part of the mayor of the city of New York who is the chairman of the board of estimate and apportionment to have the accounts of the board of education examined pursuant to the provisions of section 119 of the charter from which we have quoted. The appellant issued a subpoena to the respondent Cook, who is the auditor of the board of education, requiring him to appear and testify upon such examination. The board of education at a meeting thereof at which the superintendent of schools was present ordered the superintendent to permit the commissioner of accounts to make an investigation of the accounts of the board of education. Under the advice and direction of the commissioner of education Cook refused to obey the subpoena. An application was then made for a warrant of attachment to compel his attendance as a witness, in pursuance of

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sections 854 and 855 of the Code of Civil Procedure. The Special Term granted the motion and directed him to appear for examination. (*Matter of Hirshfield v. Cook*, 107 Misc. Rep. 130.) On appeal to the Appellate Division the order was reversed and the motion denied. (*Matter of Hirshfield v. Cook*, 188 App. Div. 843.) The determination of the question before us depends upon a construction of the act of 1917.

Under that act which is made a part of the Education Law (Article 33a) it is provided that a board of education is established in each city of the state and that the educational affairs in each city shall be under the general management and control of a board of education. (Section 865.) The powers and duties of the board of education are stated with some detail. (Section 868.) So far as the city of New York is concerned the power of appointment of the members of the board of education is retained by the mayor. (Section 866.) The board of aldermen upon the recommendation of the board of estimate and apportionment has power to fix the salaries in the department of education except those of teachers, examiners, and members of the supervising staff. (Greater N. Y. Charter, sec. 56; *Matter of Dobrovolny v. Prendergast*, 219 N. Y. 280; *Hogan v. Board of Education, N. Y.*, 200 N. Y. 370.)

It is the duty of the board of education to make reports to the mayor with such suggestions and recommendations relative to the public schools of the city of New York as it may deem proper. (Greater N. Y. Charter, sec. 1095.) The mayor is authorized to remove members of the board of education for reasons in the charter enumerated. (Greater N. Y. Charter, sec. 1096.)

The act of 1917 expressly repeals certain specified laws and also sections of the Greater New York charter and provides that "All acts or parts of acts, general or special, inconsistent with the provisions of this act are hereby repealed * * *. And all acts or parts of acts,

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general or special, not specifically repealed by this act and not inconsistent with the provisions of this act shall remain in full force and effect." (Sec. 881, subd. 3.)

In considering whether the legislature intended that any particular part of the charter of the city of New York not expressly repealed is repealed by implication, consideration should be given to the language of section 1618 thereof which provides: "This act or any section or provision thereof shall not be deemed to be repealed or amended by any act of the legislature, unless it be so expressly stated, or the legislative intention to that effect is unmistakable." The intent must be manifest. (*Peterson v. Martino*, 210 N. Y. 412, 418.)

The act of 1917 did not expressly repeal that part of section 96 of the Greater New York charter which provides that the department of education shall be an administrative department of said city; nor section 108 thereof which provides that the head of the department of education shall be called the board of education. The intention of the legislature to repeal said sections so far as they relate to the board of education is not so clear as to be "unmistakable." From a consideration of the provisions of the charter that concededly have not been repealed and of the provisions of the act of 1917 some of which are herein mentioned, we do not think that it was the intention of the legislature to repeal said sections so far as they relate to the board of education.

The inter-relations of the city of New York and the board of education thereof are affirmatively shown by the act of 1917 as well as by the provisions of the Greater New York charter that have not been repealed. While the educational affairs in each city are under the general management and control of the board of education, such board is subject to municipal control in matters not strictly educational or pedagogic. Section 877 of the act of 1917 provides that "In a city which had, according to the

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Federal census of nineteen hundred and ten, a population of one million or more, such estimate (for the current or ensuing fiscal year of such sum of money as it may deem necessary) shall be filed with the board of estimate and apportionment. If the total amount requested in such estimate shall be equivalent to or less than four and nine-tenths mills on every dollar of assessed valuation of the real and personal property in such city liable to taxation, the board of estimate and apportionment shall appropriate such amount. If the total amount contained in such estimate shall exceed the said sum of four and nine-tenths mills on every dollar of assessed valuation of the real and personal property in such city liable to taxation, such estimate shall, as to such excess, be subject to such consideration and such action by the board of estimate and apportionment, the board of aldermen, and the mayor as that taken upon departmental estimates submitted to the board of estimate and apportionment. The board of estimate and apportionment is authorized to make additional appropriations for educational purposes authorized by this chapter. * * * The general school fund shall be raised in bulk and for the city at large. The board of education shall administer all moneys appropriated or available for educational purposes in the city, *subject to the provisions of law relating to the audit and payment of salaries and other claims by the department of finance.*" (Subd. 7.)

It appears that the board of education submitted to the board of estimate and apportionment in the year 1918 for the purpose of the budget for the year 1919 an itemized estimate of its expenses for the year 1919 as required by the Education Law. The aggregate of the detailed items of such estimate was \$46,104,330.08. The total amount appropriated by the board of estimate and apportionment for 1919 was \$45,121,163.26, which was \$3,025,000 in excess of the four and nine-tenths mills

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which the board of estimate and apportionment is required to appropriate if declared to be necessary by the board of education.

The appropriation mentioned does not include any provision for the purposes or liabilities comprehended in paragraph c, subdivision 1 of section 877 of the Education Law. Other provisions have been made therefor about which there is a controversy, but the details of such provisions are immaterial in deciding the question now before us.

Although the board of estimate and apportionment had appropriated to the board of education for the year 1918 \$42,501,156.04, which was the exact product of four and nine-tenths mills on every dollar of assessment of real and personal property in New York city for that year, in January, 1919, the board of education requested the board of estimate and apportionment to make additional appropriations aggregating \$3,200,000 for it to meet liabilities alleged to have been incurred by the board of education in the year 1918 in excess of appropriations made for it. Six hundred thousand dollars has been appropriated by the board of estimate and apportionment on account of such alleged liabilities. The board of estimate and apportionment requested the board of education to furnish the facts and particulars in detail with respect to such alleged liabilities and the necessity for an additional appropriation. The information thus sought has not been furnished by the board of education.

"A board of education may, to meet emergencies which may arise, submit a special estimate in which items for extraordinary expenses may be submitted to meet such emergencies. Such estimate shall contain a complete statement of the purposes for which the items are requested and the necessity therefor. The same method of procedure shall be followed in submitting such estimate and such estimate shall be subject to the same consideration

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and action as is required in the submission, consideration and action upon the regular annual estimate submitted by a board of education. The common council in such a city shall have power to make the appropriations requested by a board of education in such special estimate * * *. (Subd. 8.)

Section 879 provides: "In a city having a population of one million or more; the board of estimate and apportionment may in its discretion annually cause to be raised such sums of money as may be required for the purposes enumerated in subdivision c of section eight hundred and seventy-seven of this act (the remodelling or enlarging of buildings under its control and management, the construction of new buildings for uses authorized by this chapter and the furnishing and equipment thereof, the purchase of real property for new sites, additions to present sites, play-grounds or recreation centers and other educational or social purposes, and to meet any other indebtedness or liability incurred under the provisions of this chapter or other statutes, or any other expenses which the board of education is authorized to incur), in the manner provided by law for the raising of money for such purposes." (Subd. 4.)

Section 880 provides: "Public moneys apportioned to a city by the state and all funds raised or collected by the authorities of a city for school purposes or to be used by the board of education for any purpose authorized in this chapter, or any other funds belonging to a city and received from any source whatsoever for similar purposes, shall be paid into the treasury of such city and shall be credited to the board of education." (Subd. 1.)

"Such funds shall be disbursed only by authority of the board of education and upon written orders drawn on the city treasurer or other fiscal officer of the city * * * (Subd. 2.) * * * and such funds shall not be paid out except on audit of the board of education and the *counter signature of the comptroller* * * * *The board*

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*of education of such city shall make, in addition to such classification of its funds and accounts as it desires for its own use and information, such further classification of the funds under its management and control and of the disbursements thereof as the comptroller of the city * * * shall require, and such board shall furnish such data in relation to such funds and their disbursements as the comptroller * * * shall require."* (Subd. 3.)

The city of New York is given supervisory authority over the amount of expenditures in the city for school purposes, whenever they exceed four and nine-tenths mills on every dollar of the assessed valuation of the real and personal property in the city liable to taxation. The board of estimate and apportionment, the board of aldermen and the mayor, each in the manner and to the extent provided by the charter, is charged with the responsibility and duty of considering and determining what moneys, if any, in excess of four and nine-tenths mills on every dollar of assessed valuation shall be appropriated to the board of education the same as they are severally charged with the responsibility and duty of determining the amount to be appropriated upon or pursuant to other departmental estimates submitted to the board of estimate and apportionment. It is only when an appropriation not exceeding four and nine-tenths mills on every dollar of assessed valuation is requested by the board of education that the amount must be appropriated. The appropriation in that case rests upon the command of the state expressed in the statute. If the board of education requests an appropriation of the board of estimate and apportionment exceeding four and nine-tenths mills on every dollar of assessed valuation the boards and officers of the city charged with the duty of determining what amount, if any, shall be appropriated to the board of education in excess of four and nine-tenths mills on every dollar of assessed valuation, should have full information and

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knowledge of the requirement of the public schools of the city.

One of the ways provided by the charter for eliciting information for use in behalf of the city is an examination to be conducted pursuant to section 119 of the charter from which we have quoted. This court has recently held in substance that the commissioner of education as the chief executive officer of the state system of education can, within the jurisdiction of such commissioner, determine matters of school policy and administration, and in doing so is not subject to review by the courts. (*Bullock v. Cooley*, 225 N. Y. 566.) His general management and supervision of the public schools as such executive officer of the education department of the state, does not give him exclusive authority to determine all controversies affecting a municipality when it claims authority independent of and in hostility to the education department. (*People ex rel. Hylan v. Finegan*, 227 N. Y. 219.)

The responsibility of determining the amount of money to be spent by the board of education over and above the prescribed amount as stated has been left to the city of New York and not to the education department of the state or its agencies as such, and that duty on the part of the city includes the duty of ascertaining the facts upon which its responsibility should be exercised.

Whether the examination of the auditor of the board of education is desired because the board of education is in a limited extent an administrative department of the city, or because the commissioner of accounts deems the examination for the best interests of the city, we think he is entitled to conduct such examination for the purpose of ascertaining the financial condition of the city and the needs of the public schools therein, if any, over and above the amount that must be appropriated simply on the request of the board of education. If the state through its legislature intends to make the board of

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education of the city wholly independent of municipal action and prevent the city or the officers and boards thereof from asserting any authority relating to matters connected with the public schools and the determination of the expenditures therefor, it should be stated by it in such clear language that its intention is "unmistakable."

The order of the Appellate Division should be reversed, and that of the Special Term affirmed, with costs in this court and in the Appellate Division.

HISCOCK, Ch. J., CARDZOZO, POUND, McLAUGHLIN and ANDREWS, JJ., concur; HOGAN, J., absent.

Order reversed, etc.

HARRY J. LEFFERT, as Assignee of CONEY AUTO-MAZE CORPORATION, Respondent, *v.* STEPHEN E. JACKMAN, Appellant, Impleaded with Another.

Stock Corporation Law — consent of stockholders required to make legal and effectual mortgage on corporate property.

The purpose of section 6 of the Stock Corporation Law (Cons. Laws, ch. 59) is to require the consent of the stockholders as therein provided in every case to make legal and effectual a mortgage on corporate property. This question may be raised by a general assignee of the corporation for the benefit of creditors. (*Vail v. Hamilton*, 85 N. Y. 453, followed; *Black v. Ellis*, 197 N. Y. 402, distinguished.)

Felbel v. Jackman, 183 App. Div. 938, affirmed

(Submitted October 14, 1919; decided December 2, 1919.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered September 9, 1918, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to have a chattel mortgage, purported to be given by the Coney Auto-Maze Corporation, adjudged illegal and void and

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to have the same canceled of record because it had not been consented to by the holders of not less than two-thirds of the capital stock of the corporation as provided by section 6 of the Stock Corporation Law.

The Coney Auto-Maze Corporation is a domestic stock corporation. It became the lessee of certain property on Coney Island for a term commencing May 18, 1915, and ending January 1, 1920, and entered into possession thereof. Pursuant to the provisions of the lease there became due to the landlord on the 5th day of July, 1916, the sum of \$4,250 as rent for the period between the 5th day of July, 1916, and the 2d day of January, 1917. It did not pay said rent and to avoid being dispossessed from the property and on the 17th day of August, 1916, the corporation and the defendant Payntar jointly and severally executed and delivered to the defendant Jackman, the landlord, their promissory note dated that day for said amount of \$4,250 payable on October 1, 1916, with interest, and at the same time the corporation by its officers executed and delivered to said landlord a chattel mortgage on certain personal property owned by the corporation as security for the payment of the note. The mortgage was executed and delivered without the consent in writing or otherwise of two-thirds of the stockholders of said corporation and (no assent) by two-thirds of its stockholders has ever at any time been given thereto.

It appears without contradiction that at the time the mortgage was executed and delivered the statute was considered by the mortgagee and he was told by the defendant Payntar, the president of the corporation, that it would not be possible to obtain the required statutory consent thereto. The defendant Payntar, on signing said note jointly with the corporation, personally gave to the mortgagee other collateral as security for the payment of the note. Counsel acting for the landlord and mortgagee, at the time the mortgage was given,

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testified in substance that he took the corporate mortgage because he was trying to get everything to secure the note that he could obtain. Neither the note nor the chattel mortgage has been paid.

On September 27, 1916, the corporation duly made, executed and delivered to Frank J. Felbel a general assignment of all its property for the benefit of its creditors. The plaintiff, Harry J. Leffert, has since been duly substituted as such assignee in the place of said Felbel. This action was brought by the general assignee to set aside said chattel mortgage as illegal and void and to have the same canceled of record. An answer was duly interposed by the mortgagee. The issues were tried at the Kings Special Term and judgment was rendered in favor of the plaintiff, from which judgment an appeal was taken to the Appellate Division, where it was unanimously affirmed. (*Felbel v. Jackman*, 183 App. Div. 938.)

Alexander Van Wagoner for appellant. The objection that the chattel mortgage in question is invalid by reason of the non-compliance with the provisions of section 6 of article 1 of chapter 59 of the Consolidated Laws is not available to an assignee for the benefit of creditors. (*Paulding v. Chrome Steel Co.*, 94 N. Y. 334; *Market & Fulton Bank v. Jones*, 7 Misc. Rep. 207; 90 Hun, 605; *Sugar Co. v. Whitin*, 69 N. Y. 328; *Welch v. Bank*, 122 N. Y. 177; *Beebe v. Power Co.*, 3 App. Div. 334; *Black v. Ellis*, 129 App. Div. 140; 197 N. Y. 402; *Bank v. Averell*, 96 N. Y. 467; *Quee Drug Co. v. Plaut*, 51 App. Div. 607; *London Realty Co. v. Coleman Stable Co.*, 140 App. Div. 495; *Vail v. Hamilton*, 85 N. Y. 453.)

Robert E. Samuels for respondent. The mortgage being invalid because of the lack of the statutory consent of stockholders may be so declared at the suit of the mortgagor's assignee for the benefit of creditors. (*Vail*

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v. *Hamilton*, 85 N. Y. 453; *Lord v. Yonkers Fuel Gas Co.*, 99 N. Y. 548; *London Realty Co. v. Coleman Stable Co.*, 140 App. Div. 495; *Quee Drug Co. v. Plaut*, 51 App. Div. 607; *Minnick v. Troy*, 83 N. Y. 516; *Tobias v. Rogers*, 13 N. Y. 69; *Post v. Davis Co.*, 219 Fed. Rep. 171; *Clover v. Ehrlich*, 62 Misc. Rep. 245; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Greaves v. Gouge*, 69 N. Y. 154.) The plaintiff is not bound to restore or pay, as a condition of maintaining this action, the value of the benefits received from the mortgagee. (*Bissell v. M. S. R. R. Co.*, 22 N. Y. 258; *R. S. Bank v. Averell*, 96 N. Y. 467; *Pumpelly v. Phelps*, 40 N. Y. 60; *Vail v. Hamilton*, 85 N. Y. 453.)

CHASE, J. Section 6 of the Stock Corporation Law (Chapter 59 of the Consolidated Laws) provides that a stock corporation shall have power to borrow money and contract debts when necessary for the transaction of its business, or for the exercise of its corporate rights, privileges or franchises or for any other lawful purpose of its incorporation, "and it may mortgage its property and franchises to secure the payment of such obligations, or of any debt contracted for said purposes. Every such mortgage, except purchase-money mortgages and mortgages authorized by contracts made prior to May first, eighteen hundred and ninety-one, shall be consented to by the holders of not less than two-thirds of the capital stock of the corporation, which consent shall be given either in writing or by vote at a special meeting of the stockholders called for that purpose, upon the same notice as that required for the annual meetings of the corporation; and a certificate under the seal of the corporation that such consent was given by the stockholders in writing, or that it was given by vote at a meeting as aforesaid, shall be subscribed and acknowledged by the president or a vice-president and by the secretary or an assistant secretary, of the corporation, and shall be

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filed and recorded in the office of the clerk or register of the county wherein the corporation has its principal place of business. * * *

The question whether the purpose of the statute is simply to protect the stockholders from careless, improvident or corrupt acts of the officers of a corporation or is intended to require the consent of the stockholders as provided in the statute in every case to make legal and effectual a mortgage on corporate property, has been a subject for consideration in this, and other states where similar statutes exist, and the conclusions reached are not uniform. In this state, however, the answer to the question was unmistakably given by this court in 1881 long before the enactment by the legislature of the Stock Corporation Law of 1890 and, of course, the amendments thereto and revisions and consolidations thereof since that time.

We refer to the decision in *Vail v. Hamilton* (85 N. Y. 453). In that case it appears that the Secor Manufacturing Company had a capital stock consisting of five thousand shares, all of which had been issued. In March, 1874, nine hundred and forty shares of the stock were transferred to and became the property of the company. In July five hundred of the shares so held by it were transferred on the books of the corporation to one C. for the purpose of securing an indebtedness of the corporation and a certificate therefor was delivered to him. On the 1st of October the company executed to defendants as trustees a mortgage upon its property to secure \$100,000 of its bonds. At the time of the execution of the mortgage a written assent to it was signed by stockholders owning two thousand seven hundred and sixty-four shares of the stock and in addition a consent was signed by the company by its secretary and president claiming therein to be a stockholder to the amount of nine hundred and forty shares. C. did not know of nor assent to the mortgage. The company became insolvent in 1877

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and the plaintiff was appointed its receiver and brought the action to set aside the mortgage upon the ground that the necessary assent of stockholders thereto had not been given. The court say: "But while a certain limited number of the stockholders, to be called trustees, were empowered in that character to manage this property and the stock and concerns of the company, neither in a corporate capacity, nor through its trustees, was it permitted to mortgage the same without first obtaining and filing 'the written assent of the stockholders owning at least two-thirds of the capital stock of such' company. (Laws of 1848, chap. 40, §§ 2, 3; Laws of 1864, chap. 517; Laws of 1871, chap. 481.) It is noticeable that there is thus called into action, the corporation as an artificial entity, the body of the trustees as its agent, and lastly, the constituent members of the corporation or the several individuals composing it. To each of these a duty is assigned, and to make valid the transaction now before us, it is plain that something more than corporate action was required. The corporation might become a party to the mortgage, and the trustees direct its officers to execute it; but there must still be the assent of the stockholder. The will of the whole body, expressed by vote or resolution, cannot take its place." (p. 456.)

The court further held that the assent of the corporation claiming as an owner of nine hundred and forty shares is simply the assent of the corporation and should not be counted toward the assent required by the statute. The court further, in considering the particular shares transferred on the books of the corporation to C., say: "Including these shares as part of the stock to be represented, the assent required by statute was not given and the mortgage is of no validity. It was, however, an apparent lien upon the property embraced in it; and we concur with the General Term in the conclusion that the action was well brought by the receiver to remove it." (p. 459.)

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The judgments of the lower courts setting aside the mortgage were affirmed.

In *Rochester Savings Bank v. Averell* (96 N. Y. 467), which was an action brought to foreclose a corporate mortgage where the consent of two-thirds of the stockholders was not obtained at the time of the execution of the mortgage, the court say: "But no assent of the stockholders having been obtained, it was invalid and created no present lien upon the property. (*Vail, Rec'r., v. Hamilton*, 85 N. Y. 453.) In the case cited, this court affirmed a judgment setting aside at the instance of a receiver, a mortgage executed by a corporation organized under the act of 1848, on the ground that the assent of the requisite number of stockholders had not been obtained. The case is an authority for the proposition that the assent of stockholders is an indispensable condition to the creation of a valid mortgage under the act of 1864." (p. 472.)

In that case (*Rochester Savings Bank v. Averell*) the assent of stockholders was obtained before there were any intervening rights and the court held that the mortgage became valid as of the time when the assent was given. To the same general effect is the decision in *Welch v. Importers & T. N. Bank* (122 N. Y. 177) and *Martin v. Niagara F. P. Mfg. Co.* (122 N. Y. 165).

In *Lord v. Yonkers Fuel Gas Co.* (99 N. Y. 547) the plaintiff sought to foreclose a corporate mortgage on real and personal property and also the rights, privileges and franchises described in the mortgage. Judgment of foreclosure and sale was entered from which an appeal was taken. It appears that the consent of two-thirds of the stockholders of the corporation to the execution of the mortgage covered only the real and personal property of the company and did not mention its franchises, privileges and rights. The court say: "This omission is, of itself, sufficient ground for holding the mortgage inoperative as to those rights. The judgment

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appealed from authorizes the sale of the real and personal property, and also of all the rights, privileges, and franchises described in the mortgage. In so far as it authorizes a sale of the corporate franchises of the company, the judgment should be reversed." (p. 557.)

The conclusion reached in the decision of this court in *Vail v. Hamilton* (*supra*) was approved, reasserted or expressly followed in *Astor v. Westchester Gas Light Co.* (33 Hun, 333); *Farmers Loan & Trust Co. v. Baker* (20 Misc. Rep. 387); *Matter of Wendler Machine Co.* (2 App. Div. 16); *Beebe v. Richmond L., H. & P. Co.* (13 Misc. Rep. 737, 742); *Quee Drug Co. v. Plaut* (51 App. Div. 607); *London Realty Co. v. Coleman Stable Co.* (140 App. Div. 495); *Matter of Post & Davis Co.* (219 Fed. Rep. 171); *Matter of Progressive Wall Paper Corporation* (230 Fed. Rep. 171); *Karasik v. Peoples Trust Co.* (252 Fed. Rep. 324).

The decisions of this court relied upon by the appellant do not sustain his contention. In *Greenpoint Sugar Company v. Whitin* (69 N. Y. 328, 333) the court in the discussion of the question then before it say that its decision is made "Without considering the question whether any but stockholders may interpose the objection to the authority exercised in this case."

In *Paulding v. Chrome Steel Co.* (94 N. Y. 334, 341) the court, referring in substance to the question whether the assent required by the statute to the giving of a mortgage was simply for the benefit and protection of stockholders against improvident or corrupt acts of the officers of the corporation, or because the legislature regarded the mortgaging of corporate property without such assent as improper *per se*, say: "The question, however, does not arise here, for neither the policy of the act nor its beneficent action can be invoked for the agreement was in fact made and the mortgage authorized by all the stockholders."

In *Black v. Ellis* (197 N. Y. 402) a corporation had

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acquired title to chattels covered by a purchase-money mortgage. Its acquisition of title was subject to the lien of said chattel mortgage, and to a covenant to renew it in every year in proper form. The court held that the obligation to renew was a part of the purchase price of the chattels and that the statute requiring the consent of stockholders to a corporation giving a mortgage on its property did not apply to the renewal mortgage under consideration. The court say: "The statute manifestly applies to creating a new encumbrance on corporate property, not to keeping alive one existing on property acquired subject to mortgage and under agreement to continue as a valid and subsisting lien." (p. 411.)

As the question whether a corporate mortgage was executed with the consent of stockholders as required by the statute can be raised by the corporation and a receiver thereof, it is manifest that it can be raised by a general assignee for the benefit of all the creditors.

The judgment should be affirmed, with costs.

HISCOCK, Ch. J., COLLIN, CARDOZO, POUND, CRANE and ANDREWS, JJ., concur.

Judgment affirmed.

GEORGE H. DIEHL, JR., Appellant, *v.* AMALIE M. BECKER, as Executrix of ERNEST G. HOFFMANN, Deceased, and WILLIAM D. SPORBORG, as Administrator with the Will Annexed of the Estate of ERNEST G. HOFFMANN, Deceased, Respondents.

Decedent's estate — short Statute of Limitations — what must be done to set such statute in operation — usury — when agreement to repay loan with a specified bonus dependent upon varying conditions of sale of patented invention is usurious.

1. To set in operation the short Statute of Limitations (Code Civ. Pro. § 1822) two things are necessary: *First*, the claim must be exhibited to the executor. "Exhibited" as here used means a presen-

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tation of the claim to the executor in writing and a demand for its payment. *Second*, notice of rejection must be served upon the claimant. The demand must be clear and decisive. A general conversation from which contrary inferences may be drawn as to whether a demand for immediate payment was or was not intended, or as to whether the executor should have understood that such a demand was made, is not enough.

2. Even if a letter properly directed and stamped is properly mailed, the presumption of its receipt is one of fact based upon the circumstances of the particular case. Where there was no proof of a proper address or of proper stamps, the trial court was justified in finding that it was never received.

3. Where the debtor may under the terms of a contract relieve himself of all further liability by payment of the principal and interest of a loan, there is no question of usury involved even though on certain contingencies a greater amount would become due. (*Sumner v. People*, 29 N. Y. 337, followed.)

4. On examination of the terms of an agreement for a loan which was to be repaid with certain sums as a bonus dependent upon varying conditions relative to the sale or license by the borrower of certain patented inventions, *held*, that the agreement was such that the borrower could not by its terms be relieved of the payment of a greater sum than the principal and interest at the legal rate and, therefore, the loan was usurious.

Diehl v. Becker, 186 App. Div. 16, affirmed.

(Argued October 22, 1919; decided December 2, 1919.)

APPEAL from a judgment entered February 3, 1919, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiff entered upon a verdict directed by the court and directing a dismissal of the complaint.

The complaint alleged that on March 19th, 1908, the plaintiff loaned to one Hoffmann the sum of \$5,000 upon the terms and conditions of the following letter:

“March 19th, 1908.

“Mr. GEORGE H. DIEHL, JR.,

“New York City.:

“MY DEAR SIR.—If you will loan me the sum of Five thousand Dollars (\$5,000) I will secure to you the payment of that amount out of the net proceeds realized

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by me from the sale or other disposition of the following inventions of mine or from the granting of any rights or licenses thereunder or under any Letters Patent of the United States that may be granted therefor, viz:" [Describing certain letters patent.] "I also agree that if any such sale or license be made within six months from the date hereof to pay to you out of the net proceeds derived therefrom as and when received by me the said sum of \$5,000 with interest thereon up to the time of payment at the rate of 6% per annum together with the further sum of \$1,250 provided the whole of said sums are thus paid within such period of six months.

"I also agree that if any such sale or license be made at any time after six months from the date hereof, to pay to you out of the net proceeds derived therefrom as and when received by me, the said sum of \$5,000 with interest thereon up to the time of payment, at the rate of 6% per annum together with the further sum of \$2,500.

"Of course it is to be understood between us that I retain the sole right for the term of five years from the date hereof to sell the above inventions and applications and any Letters Patent of the United States that may be granted therefor or to grant rights or licenses under the above mentioned applications or under any Letters Patent of the United States that may be granted therefor on such terms as I see fit notwithstanding this letter, but I hereby agree to notify you when I shall have made any such sale or license.

"I, however, agree that if I make any sale of the above mentioned inventions or Letters Patent therefor, instead of granting any rights or licenses thereunder, that I will not sell the same for less than the sum of \$10,000. On the other hand if I grant any rights or licenses under the above mentioned inventions or under any Letters Patent therefor, then the net amount of royalties which I may receive therefrom shall be paid over by me to you from

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time to time until the whole of the above mentioned sums have been fully paid to you.

"It is also understood that I am to pay to you semi-annually the interest at 6% per annum on the above mentioned sum of \$5,000 until said sum is fully paid; and of course I have the right to pay off the whole or any part of said sum of \$5,000 with the accrued interest, at any time after the date hereof, but if I do so you will, nevertheless, be entitled to receive the sum of \$1,250, or the sum of \$2,500, in addition, depending upon whether I make any sale or other disposition of the above inventions or of any Letters Patent therefor within six months from the date hereof or after that period as above set forth.

"Yours very truly,
"E. G. HOFFMANN."

John Kenneth Byard for appellant. It is well settled that to constitute usury there must be a binding obligation on the borrower to pay more than the legal rate. If payment of the excess is within the will of the borrower or if the contingency upon which such excess payment depends is subject to the exclusive control of the borrower so that he has power to determine independently of the lender whether or not the excess payment shall be made, there is no usury. (*Sumner v. People*, 29 N. Y. 337; *Richardson v. Hughilt*, 76 N. Y. 55; *Home Ins. Co. v. Dunham*, 33 Hun, 415; *Kilpatrick v. Germania Life Ins. Co.*, 95 App. Div. 287; 183 N. Y. 163; *Lord v. Cronin*, 9 App. Div. 9; *Bank of Chenango v. Curtiss*, 19 Johns. 326; *Spain v. Hamilton*, 1 Wall. 604; *Ramsey v. Morrison*, 39 N. J. L. 591; *Blake v. Yount*, 42 Wash. 201; *Cissna Loan Co. v. Gawley*, 87 Wash. 438; *Cutler v. Howe*, 8 Mass. 257; *Chaffe v. Landers*, 46 Ark. 364; *Billingsley v. Dean*, 11 Ind. 331.) The six-year Statute of Limitations does not apply. The transaction was a

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loan payable on demand after five years from the date thereof. (*Wright v. Reusens*, 133 N. Y. 298; *Elliot on Cont.* § 1521; *Russell v. Allerton*, 108 N. Y. 288; *Simon v. Eigen*, 213 N. Y. 589; *Gillet v. Bank of America*, 160 N. Y. 549; *Staten Island Shipbuilding Co. v. Spearin*, 149 App. Div. 854; *Marshall v. Com. Travelers' Mut. Acc. Assn.*, 170 N. Y. 434; *Moran v. Standard Oil Co.*, 211 N. Y. 187.) The short Statute of Limitations is not applicable. Appellant's claim was never presented to the executors of the estate of Ernest Gustav Hoffmann, and, therefore, respondent's attempted rejection thereof was necessarily inoperative and wholly nugatory. (*Ulster Co. Savings Inst. v. Young*, 161 N. Y. 23.) Assuming, but not conceding, that there was a legal presentation of appellant's claim, respondent has failed to show that the same was rejected as required by law. (*Rathbun v. Acker*, 18 Barb. 393; *People v. L., etc., R. R. Co.*, 13 Hun, 211; *Peabody v. Satterlee*, 166 N. Y. 174; *Herter v. Mullen*, 52 App. Div. 325, 329; *Matter of Boland v. Sokolski*, 56 Misc. Rep. 333.)

Thomas F. J. Connolly and William D. Sporborg for respondents. The agreement is tainted with usury and is void. (39 Cyc. 951; *Webb on Usury*, § 24; *Brown v. Brinkerhoff*, 13 Alb. L. J. 16; *Browne v. Vredenburgh*, 43 N. Y. 195; *Scott v. Fabacher*, 176 Fed. Rep. 229; *Tyng v. C. W. Co.*, 58 N. Y. 308; *Leavitt v. De Launy*, 4. N. Y. 363; *Hungerford B. & C. Co. v. Brigham*, 47 Misc. Rep. 240; *Arnold v. Angel*, 62 N. Y. 508; *Gilbert v. Warren*, 19 App. Div. 403; *Simon v. Eigen*, 213 N. Y. 589; *Simon v. Burgess*, 146 App. Div. 37; *Beatty v. Bacon*, 187 App. Div. 447.) The plaintiff's claim is barred by the six-year Statute of Limitations. (*Wallach v. Dryfoos*, 140 App. Div. 438; *Canet v. Smith*, 173 App. Div. 241; *Featherstone v. Fowler*, 174 App. Div. 452; *Varney v. Ditmars*, 217 N. Y. 223; *Watson v. Gugino*, 204 N. Y. 532; *Jones v. Kent*, 80 N. Y. 585; *Beatty v.*

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Bacon, 187 App. Div. 447.) This claim is barred by the short Statute of Limitations set forth in section 1822 of the Code of Civil Procedure as it existed at the time when the plaintiff's claim was rejected. (*Ulster Co. S. Instn. v. Young*, 161 N. Y. 23; *Titus v. Poole*, 145 N. Y. 414.)

ANDREWS, J. This action is brought to recover for a loan of \$5,000 made by the plaintiff to one Hoffmann. The defense is usury, the six years' Statute of Limitations and the six months' Statute of Limitations.

The loan was made, as the complaint alleges, upon the terms and conditions set forth in a letter written by Hoffmann to the plaintiff. At the close of the trial both sides moved for the direction of a verdict. It was directed for the plaintiff. Upon appeal, the Appellate Division reversed the judgment and dismissed the complaint, not on the facts but as a question of law on the ground that the action was barred by the six months' Statute of Limitations.

In this it erred. The trial court is presumed to have found all questions of fact raised by the evidence in favor of the plaintiff. To set in operation the short Statute of Limitations two things are necessary: *First*, the claim must be exhibited to the executor. "Exhibited" as here used means a presentation of the claim to the executor in writing and a demand for its payment. (*Ulster County Savings Institution v. Young*, 161 N. Y. 23.) *Second*, notice of rejection must be served upon the claimant.

We do not hold that where a note, signed by the deceased, is presented to the executor, and a demand made for its payment, anything more is essential. But the demand must be clear and decisive. A general conversation from which contrary inferences may be drawn as to whether a demand for immediate payment was or was not intended, or as to whether the executor

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should have understood that such a demand was made, is not enough.

Such the court might have found, and so is deemed to have found, was the situation here. The executor had advertised for claims. A conference was had between the claimant and the executor. Apparently the contract was produced. Its payment was discussed. A compromise, subject to the approval of the surrogate, was arranged. On his refusal, a notice was prepared stating that the claim filed with the executors was rejected. As a matter of law we cannot say these facts show such a presentation as the statute requires.

The notice of rejection was addressed to the plaintiff and mailed to him at 127 Duane street, New York. The statute contemplates the service of such notice upon the claimant. If he receives it, probably it is not material how it reaches him. (*Sweeney v. City of New York*, 225 N. Y. 271.) But there must be some proof that it has been actually received. Even if a letter properly directed and stamped is properly mailed, the presumption of its receipt is one of fact based upon the circumstances of the particular case. (*Gates v. State of N. Y.*, 128 N. Y. 221.) Here there is no proof of a proper address or of proper stamps. The trial court was at least justified in finding that it was never received.

Under the contract repayment of the loan could not be demanded within five years. Therefore, the six-year Statute of Limitations is not applicable.

The more serious question is that of usury.

"No person * * * shall, directly or indirectly, take or receive in money, goods or things in action, or in any other way, any greater sum or greater value, for the loan or forbearance of any money, goods or things in action, than" six per cent per annum. (General Business Law [Cons. Laws, ch. 20], § 371.)

In the lower courts there has been great diversity of opinion as to the proper interpretation of the contract.

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The majority of the Appellate Division, however, has held that by its terms Hoffmann might relieve himself of all further liability by payment of the principal and interest of the loan. If so, there is no question of usury involved even though on certain contingencies a greater amount would become due. (*Sumner v. People*, 29 N. Y. 337.)

We do not so understand the contract. Under it, three courses of action were open to Hoffmann.

1. He might make a sale or license of his patents before he repaid the loan. In that case a bonus beyond principal and legal interest would be due.

2. He might at any time repay the loan with interest. But in that case the plaintiff would still be "entitled to receive the sum of \$1,250 or the sum of \$2,500 in addition, depending upon whether I make any sale or other disposition of the above inventions or of any letters patent therefor within six months from the date hereof, or after that period as above set forth." This agreement may be variously interpreted. It may mean that the borrower retains the option to sell his inventions or not at any time and only in case he does sell is the bonus due. Or that he shall sell within a reasonable time after the expiration of the five-year period and if he fails to do so, he must pay the bonus. Or that a lien is created upon the inventions, for principal, interest and bonus, and if the latter is not paid within five years, the lien may be foreclosed. The first is the most favorable interpretation for the appellant and may be adopted for the purposes of this discussion.

In *Sumner v. People* (29 N. Y. 337, 340) Burdick agreed on November 30, 1857, that if he did not pay Sumner \$800 which he owed him by December 5th, he would give him \$16 extra. This court held that under these circumstances the jury should have been told that if the \$16 were to be paid upon a contingency over which Burdick had any control it was not usury. Where a

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payment is "conditional, and that condition is within the power of the debtor to perform, so that the creditor may by the debtor's act be deprived of any extra payment, it would not be usurious." If Burdick fulfilled the condition, he relieved himself of all further obligations. The contract was at an end. This was also true in the cases cited in the prevailing opinion and in the dissenting opinion of Judge DENIO.

In the case at bar another situation is presented. Payment of principal and interest did not end all obligations under the contract. If ever thereafter the borrower sold his patents, the bonus became due. It is true he might not sell them. But in any event the plaintiff was entitled to his principal and interest and in addition thereto he acquired this contingent right. It was a valuable right. He acquired it under the original contract as part compensation for the loan. No act of the borrower might deprive him of it. The plaintiff was to receive for the loan of his money a greater value than six per centum. This was usury within the definition of the statute.

3. Hoffmann might not repay the loan for five years. In that case the lender had a lien on the patents which he might foreclose. If he did so foreclose them, on a sale he would be entitled to his bonus. It will be noticed that the borrower promises to secure the plaintiff for the payment of the loan out of the net proceeds realized upon the sale or other disposition of his inventions. The borrower retains the sole right to sell the inventions or to grant licenses under them for five years. These clauses must mean that it was the intention to grant a lien on the patents as security for the loan. Otherwise the clause as to retaining the sole right to sell is meaningless; and especially the phrase that this is done "notwithstanding this letter." If such a lien is created the agreement is absolute to pay out of the proceeds of the sale of the patents the interest and \$2,500 bonus. Clearly

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on a foreclosure sale made after the five years the plaintiff would be entitled to such bonus.

The judgment appealed from should be affirmed, with costs.

HISCOCK, Ch. J., CHASE, COLLIN, HOGAN and CARDOZO, JJ., concur; CRANE, J., concurs in result on ground that the claim is barred by the Statute of Limitations.

Judgment affirmed.

CELIA FRIEDMAN, Appellant, v. JULIUS BLAUNER et al., Respondents.

Partnership — offer of judgment — when offer of judgment made by one co-partner not in compliance with statute (Code Civ. Pro. §§ 738-740) and not binding upon his co-partner.

1. No presumption of authority arises from a partnership, which permits third persons to hold the firm liable on offers of judgment subscribed by one of the members of the firm in his own name. Not only must one partner assuming to act for his co-partners in this regard actually be their agent, but the authority expressed or implied must be exercised in the form specified. (Code Civ. Pro. § 740.)

2. Where in an action against co-partners, one of the members of the firm signed in his individual name an offer to compromise which purported to be made on behalf of the firm, no affidavit being attached thereto to the effect that he was authorized to do so on behalf of the firm, the offer of judgment is not valid and is not sufficient to relieve the defendants from costs although the plaintiff recovered a judgment smaller in amount than the sum stated in the offer to compromise. (Code Civ. Pro. §§ 738-740.)

Friedman v. Blauner, 188 App. Div. 919, reversed.

(Submitted November 18, 1919; decided December 2, 1919.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 23, 1919, which affirmed an order of Special Term denying a motion to review the taxation of costs herein.

The following questions were certified:

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" 1. Did the plaintiff obtain a less favorable judgment than the judgment offered by the defendant?

" 2. Is the offer of judgment signed by Julius Blauner subscribed in accordance with sections 738 and 740 of the Code of Civil Procedure so as to bind his co-defendant, Isidor Blauner?

" 3. Is the offer of judgment signed by Julius Blauner a valid offer of judgment binding upon his co-defendant, Isidor Blauner, under sections 738 and 740 of the Code of Civil Procedure?

" 4. Are the defendants entitled to recover costs and disbursements of this action?"

The facts, so far as material, are stated in the opinion.

J. Robert Rubin, Nelson Ruttenberg and Milton Frank for appellant. The offer of judgment which was signed by Julius Blauner, one of the defendants, was not subscribed in accordance with section 740 of the Code of Civil Procedure. (*Garrison v. Garrison*, 67 How. Pr. 271; *Lambert v. Converse*, 22 How. Pr. 265; *Bridenbecker v. Mason*, 16 How. Pr. 203; *Smith v. Kerr*, 1 N. Y. Supp. 454; *Werblowsky v. Greenwich Ins. Co.*, 14 Abb. N. C. 96; *Rollins v. Barnes*, 23 App. Div. 240; *McFarren v. St. John*, 14 Hun, 387; *Riggs v. Waydell*, 78 N. Y. 586; *Leslie v. Walrath*, 45 Hun, 18; *Matter of City of New York [Re Baker]*, 112 App. Div. 160.) The judgment recovered by the plaintiff was more favorable than that contained in the offer of judgment. (*Lambert v. Converse*, 22 How. Pr. 265; *Bannerman v. Quackenbush*, 17 Abb. N. C. 103.) The referee had no power to include in his finding any direction for costs, except such as were authorized by statute, and on motion to review the taxation of costs, the Special Term had the power to and should have ordered the clerk to tax no costs herein, the offer of judgment not being more favorable than the recovery. (*Kiernan v. A. Ins. Co.*, 3 App. Div. 26; *McNally v. Rowan*, 101 App. Div. 342;

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181 N. Y. 556; *Osborn v. Cardeza*, 208 N. Y. 131; *Mandel v. Coppenberg*, 175 N. Y. Supp. 23; *Mayor v. Cornell*, 9 Hun, 215.)

Henry Danziger and *I. Gainsburg* for respondents. The offer of judgment signed by Julius Blauner in behalf of both of the defendants was a valid offer of judgment binding upon his co-defendant, Isidor Blauner; was subscribed in accordance with the provisions of sections 738 and 740 of the Code of Civil Procedure, and the judgment recovered by the plaintiff was less favorable than the judgment offered by the defendants. (*Phister v. Stumm*, 27 N. Y. Supp. 1000; *Markes v. Epstein*, 13 Civ. Pro. Rep. 293; *Bridenbecker v. Mason*, 16 How. Pr. 203; *A. C. Savings Bank v. McCarty*, 149 N. Y. 71; *Frendenheimer v. Raducimer*, 15 Misc. Rep. 124; *Hageman v. Young*, 8 N. Y. Supp. 111; *National Bank v. Scriven*, 63 Hun, 375; *Hooper v. Baillie*, 118 N. Y. 413; *Klump v. Gardner*, 114 N. Y. 153; *Wallace v. Goldberg*, 124 App. Div. 511.) The defendants are entitled to recovery of costs and disbursements of this action; and they were properly taxed. (Code Civ. Pro. §§ 1018, 1228; *Heinitz v. Darmstadt*, 140 App. Div. 252; *Smith v. Smith*, 121 App. Div. 480; *Hancock v. Hancock*, 22 N. Y. 558; *Bedford v. Hol-Tan Co.*, 140 App. Div. 282; *Paget v. Melcher*, 22 App. Div. 12; *Ward v. Branson*, 126 App. Div. 508; *Morgan v. Stevens*, 6 Abb. N. C. 356; *Moses v. Moses*, 154 N. Y. Supp. 555; *United Press v. N. Y. Press Co.*, 164 N. Y. 406; *Landon v. Van Etten*, 57 Hun, 122; *Safety Steam Generator Co. v. Dixon*, 61 Hun, 122.)

POUND, J. This action was brought by plaintiff against the defendants Julius Blauner and Isidor Blauner, who are alleged in the complaint to be co-partners, engaged in the business of manufacturing cloaks and suits, to recover a balance of \$2,542.56 for goods sold and delivered.

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The answer alleges that the balance due was only \$560.68. An offer of judgment under section 738, Code of Civil Procedure, was made and served in the following form:

"The defendants Julius Blauner and Isidor Blauner hereby offer to allow judgment to be taken against them herein by the plaintiff for \$560.68, with interest from the 6th day of October 1915, with costs.

Dated New York, December 27th, 1915.

"JULIUS BLAUNER.

"STATE OF NEW YORK,
"City of New York,
"County of New York.
} ss.:

"On this 27th day of December, 1915, before me personally came Julius Blauner, to me known and known to me to be the person described in and who executed the within offer of judgment, and he acknowledged to me that he had authority to execute such offer of judgment in behalf of Isidor Blauner, his co-partner.

"NATHANIEL J. LEVINE,

"Notary Public,

"Bronx Co."

The offer was not accepted. The parties then, by consent, indulged in the luxury of a long and expensive reference to hear, try and determine the issues, which terminated in a report that the plaintiff was entitled to recover only \$289.06, with interest. Costs and disbursements were thereupon awarded to defendants and taxed at \$2,964.60 in favor of the defendants over the plaintiff's objection and judgment entered in favor of defendants for the difference. It has been held below that the offer of judgment was more favorable to the plaintiff than the amount finally recovered by her in the action.

With the amount of the costs we may not here concern ourselves, as it is not before us for review, but we cannot commend the practice which saddles either of the parties

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with this unnecessary burden for referee's fees and stenographer's fees, when courts are open to litigants in which to try their causes at the public charge.

Nothing is involved in this appeal but the question of Code procedure. Sections 738 and 740, Code of Civil Procedure, read as follows:

“ § 738. Defendant's offer to compromise; proceedings thereon.

“ The defendant may, before the trial, serve upon the plaintiff's attorney, a written offer, to allow judgment to be taken against him, for a sum, or property, or to the effect, therein specified, with costs. If there are two or more defendants, and the action can be severed, a like offer may be made by one or more defendants, against whom a separate judgment may be taken. If the plaintiff, within ten days thereafter, serves upon the defendant's attorney, a written notice that he accepts the offer, he may file the summons, complaint and offer, with proof of acceptance, and thereupon the clerk must enter judgment accordingly. If notice of acceptance is not thus given, the offer cannot be given in evidence upon the trial; but, if the plaintiff fails to obtain a more favorable judgment, he cannot recover costs from the time of the offer, but must pay costs from that time.”

“ § 740. Offer and acceptance, by whom subscribed.

“ Unless an offer or an acceptance, made as prescribed in either of the last four sections, is subscribed by the party making it, his attorney must subscribe it, and annex thereto his affidavit, to the effect, that he is duly authorized to make it, in behalf of the party.”

The words “defendant” in section 738 and “party” in section 740 include all the defendants, except where special provision is made for an offer by one or more, but not all, of the defendants upon which a separate judgment may be taken only against the defendants making such offer. In this case the “defendant” and the “party” include both Julius Blauner and Isidor Blauner.

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But the offer is not subscribed by Isidor Blauner, either by himself or by agent or attorney; nor does Julius Blauner annex his affidavit to the effect that he is duly authorized to make the offer in behalf of Isidor. Indeed the signature of Julius Blauner himself does not appear to be acknowledged by him and certified in the manner prescribed by law, as it should be to entitle it to be received in evidence without further proof thereof. (Code Civ. Pro. § 937.) The offer of judgment, not having been subscribed in the form prescribed, binds only the party subscribing it, and a judgment against the firm would, if attacked by the other party, be regarded as a nullity, except as to the subscribing partner.

Defendants urge that, as the co-partner of Isidor, it is to be assumed that Julius had implied authority to make the offer to allow judgment to be taken against both defendants. But no presumption of authority arises from the partnership which permits third persons to hold the firm liable on offers of judgment subscribed by one of the members of a firm in his own name only. Not only must one partner, assuming to act for his co-partner in this regard, actually be his agent, but the authority, express or implied, must be exercised in the form specified. Plaintiff should not be put in the vexatious predicament where, by accepting the offer, she might lose the full benefit of a favorable judgment against both defendants, or by not accepting it, be mulcted the costs of her adversary. (*Heckemann v. Young*, 55 Hun, 406; revd., 134 N. Y. 170.) She was not obliged to speculate on the efficacy of an informal offer.

Even if the name of Isidor had been subscribed to the offer by Julius with authority, the offer would still be defective as to the former. An acknowledgment of authority to act for another is not the equivalent of the affidavit to the effect that the agent or attorney is authorized, required by section 740 of the Code. Perjury may not be imputed to one who merely acknowl-

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edges before a notary public that he acts for another with authority. The distinction between affidavits and certificates of acknowledgment is one both of form and substance. In this case the affidavit is wanting and the certificate of acknowledgment is defective, as above indicated.

It seems more than doubtful that judgment could have been entered even against Julius alone. He makes the offer in person. The court cannot take judicial notice of his signature and he did not furnish the proper proof thereof, but that question is not before us.

This is an action at law. Costs are not discretionary. Section 3228, Code Civil Procedure, read in connection with section 738, provides who shall be entitled to costs. The referee had no authority to award costs or direct which party should pay them. (Code Civ. Pro. § 1022.) The question was properly for the clerk in the first instance, subject to review. (Code Civ. Pro. § 3262.) While the clerk could not review or correct the direction of the referee, the judgment might be corrected by the Special Term by striking out all provisions for costs improperly awarded by him.

The order appealed from should be reversed, with full motion costs in all courts; the questions certified answered in the negative and judgment directed for the plaintiff for \$289.06 with interest and with costs.

HISCOCK, Ch. J., CHASE, CARDOZO, McLAUGHLIN, CRANE and ANDREWS, JJ., concur.

Orders reversed, with costs in all courts, and motion granted, with costs. Questions certified answered in the negative.

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THE PEOPLE OF THE STATE OF NEW YORK, Appellant,
v. HENRY ALFANI, Respondent.

Attorneys — statute (Penal Code, § 270) prohibiting any person from practicing as an attorney-at-law unless duly licensed and admitted to practice in courts of record — acts constituting violation of such statute.

1. The practice of law is not limited to the conduct of cases in courts. It embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition conveyancing, the preparation of legal instruments of all kinds, and in general all advice to clients and all action taken for them in matters connected with the law. An attorney-at-law is one who engages in any of these branches of the practice of law.

2. Under the statute (Penal Law, § 270) it is a misdemeanor for any person to practice as an attorney-at-law or to represent himself as being entitled to practice law, in any manner, without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state; and practicing as an attorney-at-law either in or out of court or holding oneself out as entitled to so practice is the offense. Therefore, to prepare, as a business, legal instruments and contracts by which legal rights are secured and to hold oneself out as entitled to draw and prepare such, as a business, is a violation of the law.

3. Where defendant, who is not an attorney-at-law, had an office in which he carried on a real estate and insurance business, and also, distinct from such work, drew legal papers, contracts for real estate, deeds, mortgages, bills of sale and wills and displayed in his window a sign bearing the words "Notary Public — Redaction of all legal papers," which defendant explained meant the drawing of legal papers, he was holding himself out to the public as being in the business of drawing papers and legal instruments for hire, and where in pursuance of such business he drew a bill of sale and chattel mortgage for a person and gave advice as to filing the same, for which services he charged and received a fee, defendant was practicing law without a license in violation of section 270 of the statute.

People v. Alfani, 186 App. Div. 468, reversed.

(Argued May 26, 1919; decided December 9, 1919.)

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APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered February 28, 1919, which reversed a judgment of the Court of Special Sessions of the Peace in the city of New York convicting the defendant of a violation of section 270 of the Penal Law by practicing as an attorney-at-law without a license and directed the discharge of the defendant.

The facts, so far as material, are stated in the opinion.

Harry E. Lewis, District Attorney (Harry G. Anderson and Ralph E. Hemstreet of counsel), for appellant. The Appellate Division erred in deciding that the acts proved by the prosecution did not constitute a violation of section 270 of the Penal Law. (*People v. People's Trust Co.*, 180 App. Div. 494; *Matter of Co-Operative Law Co.*, 198 N. Y. 479; *Ottaway v. Louden*, 172 N. Y. 129; *People v. Pierson*, 176 N. Y. 201; *Taylor v. Crowland Gas & Coke Co.*, 10 Exch. 293; *Burks v. Bosso*, 180 N. Y. 341; *State Board of Pharmacy v. Gasau*, 195 N. Y. 197; *Lantry v. Mende*, 194 N. Y. 544; 2 Lewis' *Sutherland Stat. Const.* [2d ed.] § 422; *Matter of Pace*, 170 App. Div. 818.)

Peter P. Smith for respondent. The crime charged was not proved. (Penal Law, § 270; *People v. People's Trust Co.*, 180 App. Div. 494; *People v. Title G. & T. Co.*, 180 App. Div. 648.) The rule of *ejusdem generis* when applied to the section of the Code under which the defendant was prosecuted shows that the facts established in this case do not constitute a violation of section 270 of the Penal Law. (*State Board v. Gasau*, 195 N. Y. 197; *Burks v. Bosso*, 180 N. Y. 341.)

CRANE, J. The defendant was convicted by the Special Sessions of the city of New York, borough of Brooklyn, of violating section 270 of the Penal Law. He was not an attorney and counselor-at-law, but had for a long period of time drawn legal papers and instruments for hire and

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held himself out to the public as being in that business. His conviction was reversed by the Appellate Division on the ground that such acts did not constitute practicing law and, therefore, were in nowise contrary to the statute.

The question is fairly presented whether the things done by Alfani are open to the public generally or require a license from the state before a person can perform them for compensation and as an occupation.

Henry Alfani had lived at 475 Park avenue, Brooklyn, New York, since 1888. In the basement he had an office in which he carried on a real estate and insurance business. Distinct from such work he also drew legal papers, contracts for real estate, deeds, mortgages, bills of sale and wills. A large sign placed over his dining-room or basement window bore the words in big letters "Notary Public — Redaction of all legal papers." The defendant said "redaction" meant the drawing of legal papers. He was sixty years of age and evidently an Italian, as he testified in part through the Italian interpreter.

On December 27, 1917, two investigators of the state industrial commission called on Alfani at his office and asked him to look after a matter for them. Gallo, one of the men, said his name was George Lecas and that he lived at 23 Cook street, Brooklyn, where he had a soda water stand which together with a stock of cigars, cigarettes, candies and malted milk he had sold to the other man whom he introduced as Geannelis. The terms of the sale were these: the purchaser agreed to assume the seller's contract to pay five dollars twice a month to the American Siphon Company from which the fountain had been obtained, \$65 being still due thereon; the stock was to be \$26 cash and the good will \$145 to be paid for by Geannelis — \$50 that night, \$50 January 15th and \$45 January 31st. The last payment was to be extended ten days if the purchaser was unable to meet it on time. The defendant advised that a bill of sale be drawn and that the purchaser give back a chattel mortgage. He explained about the

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necessity of filing the mortgage in the county clerk's office and the foreclosure by a city marshal in case of non-payment. The papers were drawn and executed for which the defendant charged and received four dollars. Before leaving Gallo said: "In case I have any trouble of any kind and I need any legal advice can I come back to you?" to which Alfani replied, "Yes."

By section 270 of the Penal Law it is a misdemeanor for any natural person "to make it a business to practice as an attorney-at-law * * * or to hold himself out to the public as being entitled to practice law as aforesaid, or in any other manner, * * * without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state." To practice or to represent as being entitled to practice law *in any manner* is prohibited to those not lawyers.

The Appellate Division was of the opinion that this section related only to practice connected with court or legal proceedings. The restriction is broader than this for effect must be given to the words "or in any other manner." The words "as aforesaid" have reference to practice in the courts mentioned, and the following "or in any other manner" refer to the practice as an attorney-at-law out of court and not in legal proceedings. Practicing as an attorney-at-law in or out of court or holding oneself out as entitled to so practice is the offense. Not only is this the natural reading of the section but the lower court in a previous decision held that practicing law was not confined to court work.

In *Matter of Duncan* (83 S. C. 186, 189; 65 S. E. Rep. 210) it is said: "It is too obvious for discussion that the practice of law is not limited to the conduct of cases in courts. According to the generally understood definition of the practice of law in this country, it embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions

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and proceedings on behalf of clients before judges and courts, and in addition conveyancing, the preparation of legal instruments of all kinds, and in general all advice to clients and all action taken for them in matters connected with the law. An attorney-at-law is one who engages in any of these branches of the practice of law."

Thornton on Attorneys-at-Law, in section 69, defines the practice of law in the same terms.

In *Eley v. Miller* (7 Ind. App. 529, 535) the court stated: "As the term is generally understood, the practice of law is the doing or performing services in a court of justice in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be depending in a court."

To the same effect are *Barr v. Cardell* (173 Iowa 18, at page 31), and *Savings Bank v. Ward* (100 U. S. 195). (See, also, *People v. Schreiber*, 250 Ill. 345; *People v. Taylor*, 56 Colo. 441.)

To make it a business to practice as an attorney-at-law not being a lawyer is the crime. Therefore, to prepare as a business legal instruments and contracts by which legal rights are secured and to hold oneself out as entitled to draw and prepare such as a business is a violation of the law.

It does not lead us to a conclusion to investigate the powers of notaries public under the Roman law or of scriveners and notaries under the English system past or present. The legislators who enacted section 270 knew what practicing law was in this state as many of them were of the profession and they were dealing with that as carried on here at the present day. It is common knowledge for which the above authorities were hardly necessary, that a large, if not the greater, part of the work of the bar to-day is out of court or office work. Counsel and

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advice, the drawing of agreements, the organization of corporations and preparing papers connected therewith, the drafting of legal documents of all kinds, including wills, are activities which have long been classed as law practice. The legislature is presumed to have used the words as persons generally would understand them, and not being technical or scientific terms "to practice as an attorney-at-law" means to do the work, as a business, which is commonly and usually done by lawyers here in this country.

The reason why preparatory study, educational qualifications, experience, examination and license by the courts are required, is not to protect the bar as stated in the opinion below but to protect the public. Similar preparation and license are now demanded for the practice of medicine, surgery, dentistry and other callings, and the list is constantly increasing as the danger to the citizen becomes manifest and knowledge reveals how it may be avoided.

Why have we in this state such strict requirements for admission to the Bar? A regents' certificate or college degree followed by three years in a law school or an equivalent study in a law office marks the course to a bar examination which must finally be passed to entitle the applicant to practice as an attorney. Recognizing that knowledge and ability alone are insufficient for the standards of the profession, a character committee also investigates and reports upon the honesty and integrity of the man. And all of this with but one purpose in view and that to protect the public from ignorance, inexperience and unscrupulousness.

Is it only in court or in legal proceedings that danger lies from such evils? On the contrary, the danger there is at a minimum for very little can go wrong in a court where the proceedings are public and the presiding officer is generally a man of judgment and experience. Any judge of much active work on the bench has had frequent

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occasion to guide the young practitioner or protect the client from the haste or folly of an older one. Not so in the office. Here the client is with his attorney alone, without the impartial supervision of a judge. Ignorance and stupidity may here create damage which the courts of the land cannot thereafter undo. Did the legislature mean to leave this field to any person out of which to make a living? Reason says no. Practicing law as an attorney likewise covers the drawing of legal instruments as a business.

That such work is properly that of an attorney seems to be recognized by other provisions of law. Section 88 of the Judiciary Law (Cons. Laws, ch. 30), relating to the disbarment of attorneys, makes it the duty of the Appellate Division in each final order of suspension to forbid the giving to another of an opinion as to the law or its application or of any advice in relation thereto.

Section 835 of the Code of Civil Procedure provides in substance that an attorney shall not be allowed to disclose a communication made by his client to him or his advice given thereon, in the course of his professional employment. Such communications have referred to a deed (*Root v. Wright*, 84 N. Y. 72); an affidavit (*Williams v. Fitch*, 18 N. Y. 546); a chattel mortgage (*Yates v. Olmsted*, 56 N. Y. 632) and a bill of sale (*Britton v. Lorenz*, 45 N. Y. 51).

Also the summary power of courts over attorneys may be exercised in matters unrelated to court proceedings, the rule being stated in *Matter of Husson* (26 Hun, 130).

Even the instances cited below of scriveners and notaries public in foreign lands drawing legal papers sustain this contention, as the laws require such to be trained and experienced men. (Halsbury's Laws of England, vol. 2, sec. 636; Jenks Short History of English Law, pp. 201, 202; 6 & 7 Vict. ch. 90, passed 1843.)

The duties of notaries public here are defined by section 105 of the Executive Law (Cons. Laws, ch. 18). Only

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in the name is there a correspondence to the continental official.

All rules must have their limitations, according to circumstances and as the evils disappear or lessen. Thus a man may plead his own case in court, or draft his own will or legal papers. Probably he may ask a friend or neighbor to assist him.

We recognize that by section 270 and also 271 a person, not a lawyer, may appear for another in a court not of record outside cities of the first and second class. The results cannot be serious. The cases are generally of minor importance to the parties; such occasions are seldom frequent enough to make it a business, and the procedure is so informal as to constitute the judge really an arbiter in the dispute.

We must, therefore, in harmony with these views, reverse the judgment of the Appellate Division and affirm that of the Special Sessions.

HISCOCK, Ch. J. I concur in the conclusions reached by Judge CRANE on the ground that there was evidence consisting of defendant's sign and repeated acts which permitted the trial court to find that the defendant held himself out to the public as being entitled to and did practice law in violation of the provisions of section 270 of the Penal Law.

McLAUGHLIN, J. (dissenting). The defendant was convicted in the Court of Special Sessions, in the borough of Brooklyn, of violating section 270 of the Penal Law. He appealed to the Appellate Division, Second Department, where the judgment of conviction was reversed and he was discharged. The People, by permission, appeal to this court.

So much of the section of the Penal Law under which the conviction was obtained as is material to the question presented on appeal, reads as follows: "Practicing or

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appearing as attorney without being admitted and registered. It shall be unlawful for any natural person to practice or appear as an attorney-at-law or as attorney and counsellor-at-law for another in a court of record in this state or in any court in the city of New York, or to make it a business to practice as an attorney-at-law or as an attorney and counsellor-at-law for another in any of said courts * * * or to hold himself out to the public as being entitled to practice law as aforesaid, or in any other manner, * * * without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state * * *."

The defendant, at the time stated in the information, was a notary public, living at 475 Park avenue, Brooklyn, in the basement of which he had a small office for the transaction of business. Over the entrance of the office was the following sign:

"Agency of the Great Eastern Casualty Co. of New York	Notary Public Redaction of all Legal Papers	Real Estate Operator Loan & Insurance Broker Established 1888."
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On the 27th of December, 1917, one Gallo, special investigator of the state industrial commission, in company with one Geannelis, entered defendant's office and he asked them what they wanted. Gallo stated that he was selling his store, which consisted of a soda water stand, together with a stock of cigars, cigarettes, etc., to Geannelis, for a certain consideration, which was named, part of which was to be paid down and the balance in installments. Gallo also stated there was a certain amount due to the American Siphon Company on the purchase price of the soda water fountain, which Geannelis was to assume and pay. The defendant advised that Gallo give a bill of sale to Geannelis and that he give a chattel mortgage for the amount remaining unpaid. He also explained it would be necessary to file the mortgage in the county clerk's office, so that the same could be foreclosed by the city marshal in case of non-payment.

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His suggestions as to the bill of sale and mortgage were followed and he thereupon prepared the same, for which he was paid four dollars.

It is contended that this transaction, together with the sign, amounted to a violation of the provisions of the statute quoted. I have been unable to reach this conclusion. The statute, unless something is read into it which does not there appear, is to prohibit a natural person practicing or appearing as an attorney-at-law in the courts mentioned, or to hold himself out to the public as being entitled to practice in such courts. The defendant did neither. Clearly, the drafting of the bill of sale and chattel mortgage was not practicing or appearing as an attorney-at-law in any court. Nor did the words on the sign, "Redaction of all legal papers" indicate that he was holding himself out as entitled to practice in such courts. The words "in any other manner," upon which stress is laid, relate to what precedes them in the sentence, viz., the courts referred to. The phrase, although general in its nature, is limited and qualified by the prior specific designations. (*Burks v. Bosso*, 180 N. Y. 341; *People v. Richards*, 108 N. Y. 137.) The rule of *ejusdem generis* applies. Where the enumeration of specific things is followed by some more general word or phrase, such general word or phrase is held to refer to the things of the same kind. (*State Board of Pharmacy v. Gasau*, 195 N. Y. 197.)

At the time defendant was convicted it was not illegal, and is not now, for natural persons to draft papers usually intrusted to lawyers. Judicial notice may be taken of the fact that in the rural districts of the state leases, deeds, bills of sale, chattel mortgages, wills and other instruments creating legal obligations are frequently prepared by laymen, notaries public and justices of the peace. Indeed, a natural person could, at the time defendant was convicted, appear for another in a Magistrate's Court, or before a justice of the peace, except in cities of the first

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and second class, and receive pay therefor. This practice is recognized by section 271, which prohibits a person from receiving compensation for appearing as attorney in a court before any magistrate in any city of the first or second class, unless admitted to practice as an attorney and counsellor in the courts of record of the state. That the legislature did not intend to prohibit such practice is apparent from the fact that at its last session it amended section 271, so that it now includes cities of the third, as well as those of the first and second class. (Laws of 1919, chap. 417.)

To give to the words "in any other manner" the legal effect suggested would prohibit a natural person anywhere in the state from drawing a legal paper of any description, or appearing in any court. This, the legislature has not yet indicated its intent to do. (See, also, *People v. Title Guarantee & Trust Co.*, decided herewith.)

One of the well-settled rules of statutory construction is that statutory offenses cannot be established by implication and that acts in and of themselves innocent and lawful cannot be held to be criminal, unless there is a clear and unequivocal expression of the legislative intent to make them such. (*People v. Phyfe*, 136 N. Y. 554.)

I am of the opinion that the defendant was not guilty of violating section 270 of the Penal Law; that the Appellate Division was right in reversing the conviction and discharging him; and its judgment should, therefore, be affirmed.

CHASE and COLLIN, JJ., and HISCOCK, Ch. J., in memorandum, concur with CRANE, J.; HOGAN, J., concurs with McLAUGHLIN, J.; CUDDEBACK, J., deceased.

Judgment reversed, etc.

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Statement of case.

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MARY NICHOLSON, as Administratrix of the Estate of JOHN NICHOLSON, Deceased, Appellant, *v.* GREELEY SQUARE HOTEL COMPANY, Respondent.

Master and servant — negligence — contributory negligence — fatal injuries to mechanic working in elevator shaft and struck by elevator descending in adjoining shaft — duty of employer to protect workman in such place — when evidence does not justify finding that decedent was chargeable with contributory negligence — doctrine of assumption of risk not applicable.

1. Where a mechanic was put in one of nine adjoining elevator shafts to repair the doors thereof, which work required him to stand on the top of the elevator cage, to put the door in front of him in order, with elevators shooting up and down beside him, the employer was charged with the duty of vigilance to keep him safe from harm, and where such workman was struck and killed by the elevator in the adjoining shaft, descending swiftly and without warning, and an action was brought to recover for his death, the question whether the defendant had been negligent was one for the jury.

2. Where in such case there is no basis in the evidence for a finding of contributory negligence, the Appellate Division erred in reversing the judgment for plaintiff "on the ground that decedent was guilty of contributory negligence as matter of law." The burden of proof was on the defendant to show that decedent's own negligence had brought him within the path of the descending car (Code Civ. Pro. § 841-b) and that burden was not sustained.

3. The defense of assumption of risk not urged upon the trial is not available for the first time on appeal, since this court is not to presume that the notice of injury was inadequate and if it was adequate it would have made the case subject to the provisions of the Labor Law, in which event assumption of risk would not be a defense. Moreover, there being no mention of such defense either in the brief or in the oral argument of counsel for the defendant, it must be held to have been abandoned.

Nicholson v. Greeley Square Hotel Co., 181 App. Div. 884, reversed.

(Argued November 19, 1919; decided December 9, 1919.)

APPEAL from a judgment, entered December 21, 1917, upon an order of the Appellate Division of the Supreme Court in the second judicial department, reversing a

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judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

William D. McNulty for appellant. The defendant was clearly negligent. (*McGovern v. C. V. R. R. Co.*, 123 N. Y. 280; *Schlemmer v. R. R. Co.*, 205 U. S. 1; *Western Electric Co. v. Houselmann*, 136 Fed. Rep. 564; *Panzar v. Tilly Foster Iron Mining Co.*, 99 N. Y. 376; *White v. Lehigh Valley R. R. Co.*, 220 N. Y. 131.) The burden rested on defendant to establish contributory negligence by affirmative proof. (Code Civ. Pro. § 841-b; *Donohue v. East River M. & L. Co.*, 224 N. Y. 149; *Curran v. Lake Champlain & M. R. R. Co.*, 211 N. Y. 60; *Gaffney v. N. Y. C. R. R. Co.*, 220 N. Y. 34.)

E. Clyde Sherwood and *Amos H. Stephens* for respondent. No negligence on the part of the employer was shown. (*Lynch v. Elektron Mfg. Co.*, 195 N. Y. 171; *Swenson v. Wills, Inc.*, 152 App. Div. 711; *Andersen v. Thompson-Starrett Co.*, 153 App. Div. 740; *Spitzer v. Healy*, 159 App. Div. 505; *Quick v. Am. Can Co.*, 205 N. Y. 330, 334; *Voorhees v. Unger*, 151 App. Div. 35, 38; *Kirby v. D. & H. Canal Co.*, 20 App. Div. 473; *Crispin v. Babbitt*, 81 N. Y. 516; *Vogel v. American Bridge Co.*, 180 N. Y. 373.) The plaintiff's intestate was clearly guilty of contributory negligence. (*Phalen v. Rae*, 219 N. Y. 394; *Lynch v. Elektron Mfg. Co.*, 195 N. Y. 171; *Quick v. American Can Co.*, 205 N. Y. 330; *Gunderson v. Roebling Const. Co.*, 156 App. Div. 16; 194 N. Y. 529; *Andersen v. Thompson-Starrett Co.*, 153 App. Div. 740; *Spitzer v. Healy*, 159 App. Div. 505; *McLaughlin v. Ry. Co.*, 111 App. Div. 254; *Cloke v. Pittsburg Cont. Co.*, 155 App. Div. 461; *Hogan v. R. R. Co.*, 208 N. Y. 445.)

CARDOZO, J. This is an action for injuries resulting in death.

The plaintiff's intestate, John Nicholson, was employed

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by the defendant as a carpenter at the Hotel McAlpin in the city of New York. The doors of the elevator shafts were out of order, and Nicholson was directed by his foreman to set them right. The hotel is twenty-four stories high, and there are nine elevator shafts, five on one side of the hall and four on the other. Nicholson, when he met his death, was working in shaft number 2. Standing on the elevator cage, which had been raised to the ninth floor, he was doing what was needful to put the door in front of him in order. While he was working, the elevator in the adjoining shaft, descending swiftly and without warning, struck and killed him. At Trial Term the plaintiff had a verdict, which the Appellate Division reversed "on the ground that decedent was guilty of contributory negligence as matter of law." In this court, the defendant attempts to sustain the reversal on that ground, and also on the ground that there was no evidence of the defendant's negligence. We think the attempt must fail.

(1) Whether the defendant had been negligent was a question for the jury. On this subject, our conclusion is not at variance with that of either of the courts below. The defendant knew that Nicholson was working in one of the shafts. It knew, or, as a jury might find, ought to have known, that his work would bring him in dangerous proximity to the elevator in the adjoining shaft. The two shafts were separated by an I-beam, $4\frac{1}{2}$ inches wide, at the level of the floors. There was no dividing wall. A turn to the right or to the left might bring the worker in the path of danger. Death was a question of inches. In these surroundings, Nicholson was busy at his task. His task was to make the doors run smoothly in their grooves. He had been engaged upon it, moving from one elevator to another, for upwards of three days. In the shaft where he was killed, he was cutting away plaster from above the dividing I-beam. While he worked, the adjoining elevator

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mounted and descended. It moved with great velocity. Between the basement and the fourteenth floor, it made no stops at all. From the fourteenth floor to the twenty-fourth, the top of the building, it took on passengers and discharged them. It passed and repassed forty-eight times an hour, or nearly once a minute. Reasonable men might not unreasonably say that some safeguard should have been adopted by the defendant for the protection of its servant, intent upon his task, a margin of a few inches between him and destruction. Possible safeguards readily suggest themselves. The elevator might have stopped for a moment as it reached the floor where he was working. If it did not stop, it might have slackened its pace, and signaled its approach. There was neither halt nor pause nor signal. The defendant says it did not know that the work would be so near the I-beam. Its duty was to learn. The work gave warning by its nature that exposure to danger might be expected. The door of the shaft, when opened, extended from eight to twelve inches into the shaft adjoining. One could not swing it to and fro, to test its movement, without risk of swerving to the right and left. One could not clear its course from end to end without the likelihood that one would have to stand and labor close to the dividing line. Such risks were within the range of prudent foresight. The precise accident that happened may not have been foreseen (*Munsey v. Webb*, 231 U. S. 150, 156; *Condran v. Park & Tilford*, 213 N. Y. 341, 345). The possibility of some accident ought to have been foreseen (*Munsey v. Webb, supra*). Nicholson was not restricted to the doing of any one thing, in order to make smooth and true the movement of the doors. He was not directed to stand at any one place. He was put within the shaft, and told to accomplish a result. The defendant who put him there, with elevators shooting up and down beside him, was charged with the duty of vigilance to keep him safe from harm.

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(2) We see no basis for a finding of contributory negligence. To hold with the Appellate Division in that respect is to ignore section 841-b of the Code of Civil Procedure, which has changed the burden of proof. Nicholson's body was found on top of the cage, his head athwart the I-beam. The burden was on the defendant to show that his own negligence had brought him within the path of the descending car. That burden was not sustained. He may have slipped or stumbled or lost his balance. If none of these things befell him, he may have miscalculated the distance in crouching down or bending forward to his work, or again in rising from it (*Schlemmer v. Buffalo, Rochester & Pittsburg Ry. Co.*, 205 U. S. 1, 14). He may have relaxed his vigilance a brief second, his mind absorbed in an engrossing task (*Conway v. Naylor*, 222 N. Y. 437, 443); and relaxation for a second would have exposed him to this swift and silent peril. Any one of these and other possible hypotheses would forbid the imputation, as a matter of law, of contributory negligence. At most, the question was for the jury.

(3) The defense of assumption of risk does not help the defendant, for it was not urged upon the trial. Had it been urged, the plaintiff might have been able to overcome it. In such circumstances, it is not available for the first time on appeal (*Scott v. Morgan*, 94 N. Y. 508, 515; *People v. Journal Co.*, 213 N. Y. 1, 6). To overcome it, the plaintiff might have proved the preliminary notice alleged in the complaint. We are not to presume that the notice was inadequate. If adequate, it would have made the case subject to the provisions of the Labor Law. In that event, assumption of risk would not be a defense (*Maloney v. Cunard S. S. Co.*, 217 N. Y. 278; *Collelli v. Turner*, 215 N. Y. 675). Even now, there is no mention of the defense either in the brief or in the oral argument of counsel for the defendant. We hold it abandoned.

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The judgment of the Appellate Division should be reversed, and that of the Trial Term affirmed, with costs in the Appellate Division and in this court.

HISCOCK, Ch. J., CHASE, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ., concur.

Judgment reversed, etc.

In the Matter of the Accounting of FRANK R. SHERMAN, as Temporary Administrator of the Estate of WILLIAM S. DEYOE, Deceased, Appellant.

MAUDE VANDENBURGH, as Administratrix with the Will Annexed of WILLIAM S. DEYOE, Deceased, Respondent.

Evidence — decedent's estate — claim based upon an oral contract or promise of decedent — corroboration of testimony of claimant — when corroboration not required as matter of law.

In an action upon a claim based upon an oral promise or contract of a decedent, or in support of such a claim disputed by an executor or administrator, the claimant is not required to prove his case by more than a preponderance of evidence. Where the evidence in support of such a claim consists of the testimony of the claimant, such testimony is not required as a matter of law to be corroborated by other evidence in order to make out a gift, although it does call for a very careful scrutiny and examination of the facts, and where a surrogate, after ruling that the testimony of a claimant, upon a claim against a decedent made by the administrator of decedent's estate, although true, required corroboration as matter of law, and for that reason denied the claim, the decision of the Appellate Division affirming the surrogate's decree, although unanimous, must be reversed because based upon insufficient and improper findings. (*Ward v. New York Life Ins. Co.*, 225 N. Y. 314, followed.)

Matter of Sherman, 173 App. Div. 988, reversed.

(Argued November 19, 1919; decided December 9, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered May 8, 1916, which affirmed a decree of the Saratoga County Surrogate's Court, settling and surcharging the

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accounts of the temporary administrator of the estate of William S. Deyo, deceased.

The facts, so far as material, are stated in the opinion.

Edgar T. Brackett for appellant. Sherman's evidence being given, there being nothing inherently improbable about it, and it being wholly uncontradicted and believed by the surrogate, who has expressly found that he told the truth, the surrogate was in error in holding that, because not corroborated, the appellant's claim was not established. (*McKeon v. Van Slyck*, 223 N. Y. 392; *Ward v. N. Y. Life Ins. Co.*, 225 N. Y. 314; *Lewis v. Merritt*, 113 N. Y. 386.)

J. H. Barker for respondent. Public policy requires that claims of personal representatives against decedents' estates must be carefully scrutinized and should be established by very satisfactory evidence. (*Matter of Marcellus*, 165 N. Y. 70; *Matter of Van Slooten v. Wheeler*, 140 N. Y. 624; *Matter of Arkenburgh*, 58 App. Div. 583; *Matter of Furniss*, 86 App. Div. 96; *Rousseau v. Rouss*, 180 N. Y. 116; *Hamlin v. Stevens*, 177 N. Y. 39; *Ide v. Brown*, 178 N. Y. 26; *Holt v. Tuile*, 188 N. Y. 17; *Matter of Schwartz*, 87 Misc. Rep. 559; *Williams v. Purdy*, 6 Paige, 166.) A proper application of the rule requires that the testimony of the claimant be corroborated by the testimony of disinterested witnesses. (*Ide v. Brown*, 178 N. Y. 26; *Hamlin v. Stevens*, 177 N. Y. 39; *Rousseau v. Rouss*, 180 N. Y. 116; *Kenney v. Public Administrator*, 2 Bradf. 319; *Matter of Manhardt*, 17 App. Div. 1; *Matter of Schroeder*, 113 App. Div. 204; *Snook v. Sullivan*, 53 App. Div. 602; 167 N. Y. 536.)

CRANE, J. On March 25th, 1914, William S. Deyoe, a resident of the town of Northumberland, Saratoga county, died leaving a last will and testament in which the appellant, Frank R. Sherman, was named as sole executor. Probate being contested, the appellant on the 31st day of March was granted letters of temporary

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administration. After the will was admitted to probate Frank R. Sherman renounced the executorship and letters of administration with the will annexed were issued to Maude Van Denburgh, the respondent herein, who duly qualified and has since been acting in that capacity.

On August 20th, 1914, the appellant filed his petition and account as such temporary administrator. He failed to include therein three bonds of the American Wood Board Company. Objections to this omission having been filed, the surrogate after a hearing surcharged the appellant with the sum of \$3,297, the value of the bonds with interest thereon from March 1st, 1914. The appellant claimed that these bonds were a gift to him by the deceased shortly before his death. The surrogate made the following findings of fact:

"12. That on the said trial in this accounting the contestant called the said Sherman as a witness and said Sherman testified that just before leaving for said hospital said Deyoe delivered to said Sherman said three coupon bonds, and at the same time said to Sherman that one of the bonds was his; that said Sherman thereupon placed all said bonds in his own safe, and none of the same were ever redelivered to said Deyoe; Sherman further testified that afterwards at the hospital, said Deyoe told said Sherman that all the said bonds were Sherman's to do with as he pleased; and that afterwards said Sherman sold said bonds as his own.

"13. That said Sherman testified truly in relation to said matter, but was not sufficiently corroborated by other evidence to establish his claim to said bonds."

In his opinion the surrogate said:

"While I fully believe that Mr. Sherman told the exact truth, I feel constrained to hold as matter of law upon the authority of the foregoing cases that the evidence is insufficient to establish a gift of the bonds to him."

The cases referred to were *Hamlin v. Stevens* (177 N. Y. 39) and *Rousseau v. Rouss* (180 N. Y. 116). At the time

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of this decision by the surrogate he had not before him our decision in the case of *McKeon v. Van Slyck* (223 N. Y. 392, 397) as it was not decided until May of 1918. There we stated as follows:

"In civil cases a plaintiff is never required to prove his case by more than a preponderance of evidence. This is as true of actions against an executor, founded on claims put forward for the first time after the death of the testator, as it is of other actions. (*Lewis v. Merritt*, 113 N. Y. 386.) No doubt in determining whether the preponderance exists, the triers of the facts must not forget that death has sealed the lips of the alleged promisor. They may reject evidence in such circumstances which might satisfy them if the promisor were living. They must cast in the balance the evidence offered upon the one side and the opportunities for disproof upon the other. They may, therefore, be properly instructed that to make out a preponderance, the evidence should be clear and convincing. (*Roberge v. Bonner*, 185 N. Y. 265.) But all these instructions in last analysis are mere counsels of caution. The responsibility of determining whether the evidence is clear and convincing must ultimately rest upon the jury, subject, of course, to the power of the court to set aside their verdict. There is no rule of law that the claimant's contract must be in writing, or even that it must be made out in all substantial particulars by disinterested witnesses."

After explaining the decision of *Hamlin v. Stevens*, the opinion further states:

"In the instant case the jury might properly have been instructed that they could reject the testimony though uncontradicted unless they found it clear and convincing. They might even have been instructed that they could in their discretion reject it if it was not corroborated in all substantial particulars by disinterested witnesses. But they could not properly be instructed that such

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corroboration was essential as a matter of law, or that the law, irrespective of the circumstances, viewed the claim with suspicion." (p. 398.)

The learned surrogate was, therefore, in error when he ruled in this case that the testimony of the appellant although true required corroboration as a matter of law. This matter having been set forth and the attitude of the surrogate fully stated in his findings of fact, the unanimous affirmation by the Appellate Division does not preclude us from reversing a judgment which those findings do not support or justify. In other words, the judgment is based upon insufficient and improper findings.

While the testimony of the appellant was not required as a matter of law to be corroborated by other evidence in order to make out a gift yet it did call for a very careful scrutiny and examination in accordance with the suggestions made in *Ward v. N. Y. Life Ins. Co.* (225 N. Y. 314, 322). It was there said:

"The rule in any civil case is that the plaintiff must establish his claim by a fair preponderance of evidence. He need do no more than this if his claim deals with a dead person; he cannot do less if he is attacking the rights and property of a living person. The general rule as to weight and quality of evidence is no different in one case than in the other. In applying the rule and test to specific evidence, however, it very likely will and should occur that the triers of fact will more carefully and critically scrutinize evidence offered against a dead person's estate for the purpose of deciding whether it does make the necessary weight and preponderance of evidence, than would be done if the testimony was offered against one who was alive to contradict it."

If upon a rehearing of this case the evidence of the appellant is admitted it should be treated in the light of these suggestions by the surrogate in determining whether or not a gift has been established.

Without of course designing to review the findings made

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by the surrogate, we may refer to the evidence for the purpose of illustration of what we have said.

William S. Deyoe was the owner of a number of farms and woodlots and tenement houses in Saratoga Springs and Schuylerville. He was engaged in lumbering, operated a sawmill and had a large number of men and teams employed in his business. On the 5th day of November, 1914, being about to enter St. Peter's Hospital in Albany for a serious operation which resulted in his death on March 25th, he requested the appellant to take charge of his farms and lots during his absence and placed in his hands three \$1,000 bonds which are involved in this proceeding. Whether the bonds were given solely to make provision for funds for the purpose of carrying on the business or given outright as the appellant's absolute property is a question even on the testimony of the appellant himself to be determined by the surrogate.

He swore that the bonds were handed to him to keep himself supplied with money. Deyoe was going to the hospital and Sherman was to look after his business affairs while he was away. Sherman says that he understood from the conversation that Deyoe was giving him these bonds or two of them to carry on the business so far as necessary. At a later time Deyoe, he says, told him that all the bonds were his. While it was not necessary as a matter of law that Sherman's testimony should be corroborated to establish a gift it surely needed careful scrutiny and analysis to ascertain whether it had that reasonableness and probability in view of all the circumstances as would naturally lead to the belief that a gift had been made and intended. Sherman was the only one interested in establishing the gift, and was foreclosed from testifying as to transactions with the deceased under section 829 of the Code of Civil Procedure. His statements regarding the nature of his possession were received apparently on the ground that the respondent had opened the door to a full inquiry by one or two

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questions asked by examining counsel. The situation and condition of the deceased, the necessities of the business, the work the appellant was to do and the manner of making the claimed gift are all matters to be considered by the trier of the facts in determining whether this testimony of a party interested proves by the necessary preponderance that a gift of the three bonds was actually made and was not intended as a means solely of raising funds to meet expenses.

In the light of the later decisions of this court and with these suggestions as to the application of the rule we send this case back to the surrogate for a retrial of the issue upon this question of gift.

The order of the Appellate Division and decree of Surrogate's Court should be reversed and a new trial granted, costs to abide the event.

McLAUGHLIN, J. (dissenting). The prevailing opinion proceeds upon the theory that the decree of the Surrogate's Court cannot be sustained because based upon "insufficient and improper findings." I have been unable to reach such conclusion. In my opinion the findings are not necessarily insufficient or improper when they are considered in the light of the evidence upon which they are based.

Notwithstanding the unanimous affirmation, if a finding be ambiguous or not clear, then we may look into the evidence for the purpose of ascertaining its true meaning or removing what is an apparent ambiguity.

The tenth finding is: "That at the time of the death of said William S. Deyoe, he was the owner of three coupon bonds of the American Wood Board Company, each of the par value of \$1,000. * * *." The second conclusion of law, which is also a finding of fact, is: "That there is no sufficient proof that said bonds, or any of them, were ever given to said Sherman by said Deyoe." These findings unanimously affirmed are sufficient to

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sustain the decree nor are they rendered "insufficient and improper" by the twelfth and thirteenth findings.

The twelfth is: "That on the said trial in this accounting the contestant called the said Sherman as a witness and said Sherman testified that just before leaving for said hospital said Deyoe delivered to said Sherman said three coupon bonds, and at the same time said to Sherman that one of the bonds was his; * * * Sherman further testified that afterwards at the hospital said Deyoe told said Sherman that all the said bonds were Sherman's to do with as he pleased; * * *."

The thirteenth finding is: "That said Sherman testified truly in relation to said matter, but was not sufficiently corroborated by other evidence to establish his claim to said bonds."

It may well be that the learned surrogate believed Sherman testified truly, but it by no means follows that he believed Sherman's testimony established a gift of the bonds to him. I cannot believe that an experienced surrogate could, after considering all of Sherman's testimony, find that it established by clear and convincing proof a gift. The bonds were delivered to Sherman for a specific purpose, which was to obtain cash with which to discharge Deyoe's obligations while he was in the hospital.

Look at the situation. Deyoe was about to go to a hospital and undergo a serious surgical operation; he had several farms; was operating a sawmill; was taking the wood and logs from a certain lot, which job he was desirous of completing as speedily as possible; had several men and teams in his employ, and wanted Sherman to employ others if he could obtain them; wanted the men and teams paid as the work progressed; to that end he sent for Sherman, told him what he wanted, and then delivered to him the three bonds in question, for the sole purpose of supplying him with cash while Deyoe was absent. Sherman testified: "Q. Before Mr. Deyoe

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went to Albany for his operation he placed you in charge of his farms, did he not? A. Yes. Q. And made provision for funds for you to use in that connection? A. Yes. Q. How much did he place in your hands? A. Three one thousand dollar bonds. Q. He gave you the bonds instead of the money? A. Yes." And at the same time Deyoe said to Sherman that "the bonds were just like so much ready money or one thousand dollar bills. * * * they were available for cash to the holder." Sherman also testified in answer to the question: "Did he say anything about where you were to get the money — were you talking with him about that question? A. As I testified, when he gave me the three bonds, he told me to keep myself supplied with money on the 5th."

It is undoubtedly true, when he delivered these bonds, that he said to Sherman one of them was his, not as a gift, but to use immediately in any way he saw fit in order to obtain money to pay the men and teams employed and discharge other financial obligations connected with Deyoe's business during his absence. What took place at the hospital six days later — Sherman in the meantime having paid out in the business in the neighborhood of seven hundred dollars — indicates that the bonds were not given as a present but to obtain the necessary funds to discharge Deyoe's obligations, and it is in this sense that the surrogate must have understood and construed the testimony. Sherman went to the hospital on the 11th of February for the purpose of having Deyoe sign some certificates so that the coupons on the bonds could be collected. These coupons amounted to but a few dollars and undoubtedly Sherman told him what he had paid out intermediate Deyoe's going to the hospital and the date of that visit. At that interview Deyoe said to Sherman, according to the twelfth finding, that all the said bonds were Sherman's to do with as he pleased. He wanted to clothe Sherman with all the

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indicia of ownership; he wanted him to act with the utmost freedom in carrying on the business and to that end, and for that purpose, he wanted to give Sherman, if necessary, power to sell the bonds, pledge them as collateral, or use them in any way he saw fit, in order to produce the desired result. That the bonds were not intended as a gift is evidenced from the words used, "to do with as he pleased." If a gift, these words meant nothing. A gift *in praesenti* transfers title absolutely from one to another and once that title is transferred the recipient of the gift, of course, can do with the object as he pleases. The donor strips himself of all interest and control and the recipient does not need to be told that he can do with the thing given as he pleases. This is the view which I think the surrogate took of this testimony as reflected by his findings.

The word "corroborated" as used in the thirteenth finding was used, I think, in the sense of established. The finding is not susceptible of a construction that the surrogate believed the gift had been made, but he is obliged to hold, as matter of law, that there being no evidence other than the testimony of Sherman a gift had not been proved. The true construction of the twelfth and thirteenth findings, it seems to me, as interpreted by the testimony of Sherman himself, simply means that while the surrogate believed that Sherman testified truly, nevertheless, his testimony did not sufficiently establish his claim to the bonds nor was there any other evidence bearing on that subject. Certainly these two findings did not destroy the effect of the first two findings which I have quoted, nor are they necessarily in conflict with them. Referring to the opinion of the surrogate this view is sustained. There, he says that the evidence is insufficient to establish a gift of the bonds. This view is also strengthened by the fact that after Sherman left the hospital with the certificates attached to the coupons, he immediately had one cashed and the proceeds of the other

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he placed to the credit of Deyoe's account. So, in the light of all the circumstances, the surrogate might very well have reached the conclusion that Sherman told the truth, but that his claim to the bonds was not established by clear and convincing evidence, which is the standard laid down in numerous authorities.

If, however, I am wrong in this conclusion and the twelfth and thirteenth findings are to be construed as holding that Sherman's testimony did establish a gift of the bonds to him, but the surrogate thought he was obliged to hold, as matter of law, the testimony being uncorroborated, that a gift had not been established, then I think instead of ordering a rehearing before the surrogate, such rehearing should be had in the Supreme Court before a jury in Saratoga county. But it is suggested, not by counsel, that there is no power in this court to make such disposition of the case. I am unable to subscribe to the proposition that this court is so impotent that it cannot order a jury trial *in any case* where the ends of justice require it. That seems to have been the view of this court in *Matter of Hopkins* (176 N. Y. 595, 596). It is true the question there involved was whether or not a jury trial should be ordered under section 2588 of the Code of Civil Procedure, relating to the probate of wills, but the court took occasion to say that it might order a jury trial "in any other case where, in its opinion, it would seem that the ends of justice might be best promoted by such a course." Here, I think the ends of justice require, if a new hearing is to be had, that such hearing should be before a jury.

For these reasons I dissent from the conclusion reached by Judge CRANE and vote to affirm the order and decree appealed from.

HISCOCK, Ch. J., CHASE, CARDOZO, POUND and ANDREWS, JJ., concur with CRANE, J.; McLAUGHLIN, J., reads dissenting opinion.

Order reversed, etc.

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MAGDALENE LYLES, as Administratrix of the Estate of RUDOLPH D. LYLES, Appellant, *v.* THE TERRY & TENCH COMPANY, INCORPORATED, Respondent.

Labor Law — provision thereof requiring owners to thoroughly plank over steel and iron beams — when question whether this was done one of fact for a jury, not of law for the court.

1. The Labor Law (Cons. Laws, ch. 31, § 20) requires that contractors or owners erecting a building with iron or steel beams "shall thoroughly plank over the entire tier of iron or steel beams and extending not less than six feet beyond such beams on which the structural iron or steel work is being erected." The master does not discharge this duty by throwing the boards down, and then closing them to passage. The duty to lay the planking imports a duty to maintain it free from unreasonable obstruction.

2. An ironworker employed in the construction of a large building, who had to go from one end of a floor to the other, walked over planking laid upon the steel framework of the floor until he came to a pile of steel beams which had been thrown across his path. He climbed over the beams and in so doing was injured. The jury found by their verdict that no planking sufficient to supply a pathway of reasonable safety had been placed on either side of the obstruction. The Appellate Division held that it was a question of fact whether planking had been provided on the east side of the obstruction but that the uncontradicted evidence showed sufficient planking to the west and, thus interpreting the evidence, dismissed the complaint. The testimony of the plaintiff, supported and strengthened by a witness, shows that there was no clear and safe pathway to the west of the obstruction. This was contradicted by a photograph produced by the defendant which shows two planks clear, and two obstructed, but plaintiff's witness testified that these planks were laid by himself after the accident and before the photograph was taken and the verdict of the jury imports a finding that the photograph was false. It follows, therefore, that the question whether the beams were "thoroughly" planked was for the jury and that the decision of the Appellate Division should be reversed.

Lyles v. Terry & Tench Co., 172 App. Div. 496, reversed.

(Argued November 24, 1919; decided December 9, 1919.)

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Points of counsel.

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APPEAL from a judgment, entered May 13, 1916, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint. Pending the appeal to this court, the original plaintiff died, and his administratrix was substituted.

The nature of the action and the facts, so far as material, are stated in the opinion.

Eugene L. McCollum for appellant. The trial court was right in allowing plaintiff's counsel to cross-examine his own witness on new matter brought out by the defendant's attorney on cross-examination concerning which new matter the witness was in no way interrogated on the direct examination. (*Hubner v. Met. St. Ry. Co.*, 77 App. Div. 290; 177 N. Y. 523; *Maloney v. Martin*, 81 App. Div. 432; 178 N. Y. 552.)

Charles Capron Marsh and *Frederick Hallock Stokes* for respondent. The plaintiff wholly failed to sustain the burden of proof as to the alleged negligence of the defendant. (*Lalor v. City of New York*, 208 N. Y. 431; *McHugh v. G. C. Bldg. Const. Co.*, 133 App. Div. 100; *Ithaca Trust Co. v. Driscoll Brothers & Co.*, 169 App. Div. 377.) Prejudicial error was committed by the trial court in allowing the plaintiff to attempt to discredit his own witness and to prove the contents of contradictory statements made by the witness out of court. (*Bullard v. Pearsall*, 53 N. Y. 230; *People v. De Martini*, 213 N. Y. 203; *Nichols v. White*, 85 N. Y. 531; *Fall Brook Coal Co. v. Hewson*, 158 N. Y. 150; *O'Doherty v. Postal Telegraph Cable Co.*, 113 App. Div. 636; *Berkowsky v. New York City Railway Co.*, 127 App. Div. 544; *Fleischer v. Met. St. Ry. Co.*, 63 App. Div. 44; *Mason v. Corbin*, 33 Hun, 365; *Koslowski v. U. S. Steel Furniture Co.*, 169 App. Div. 76; *Power v. B. H. R. R. Co.*, 157 App. Div. 400.)

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CARDOZO, J. The plaintiff, an ironwroker, employed in the construction of the Hotel Biltmore in the city of New York, found it necessary to go from one end of the building to the other, to get some bolts. He walked over planking, laid upon the steel framework of the fourteenth floor, until he came to an obstruction. The obstruction was a pile of steel beams which had been thrown across his path. He climbed over the beams, and in so doing, was injured. The jury found by their verdict that no planking sufficient to supply a pathway of reasonable safety, had been placed on either side of the obstruction. The Appellate Division held that it was a question of fact whether planking had been provided to the east, but that the uncontradicted evidence showed sufficient planking to the west; and thus interpreting the evidence, dismissed the complaint.

We think the presence of sufficient planking to the west as to the east, was a question for the jury. The plaintiff says that he looked, and saw none on either side. On cross-examination, he was led to admit the possibility that one or two planks might have been laid to the west without his seeing them. Even so, a jury was not required to deny any significance to his statement that, looking, he saw none. But the testimony of the plaintiff does not stand alone. It is supported and strengthened by that of his witness, Cooney. Cooney says that there was no pathway to the west. There were one or two planks beside the base of the pile, but five or six beams jutted out across the planks, and impeded, without preventing, passage. A photograph produced by the defendant shows two planks thus obstructed, and two others clear. This photograph, according to Cooney, does not truly depict the situation at the moment of the accident. He says that he himself laid the clear planks after the plaintiff was hurt, and before the photograph was taken. This testimony seems to have been overlooked at the Appellate Division. The trial judge instructed

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the jury that if they found the photograph correct, they could give no verdict to the plaintiff. Their verdict in his favor imports a finding that it was false. Other photographs taken at the same time show ample planking at the east. The defendant concedes, however, that the situation at the east was a question for the jury. If the photographs misrepresented the situation on one side, a jury might not unreasonably accept the statement of Cooney that they did so on the other. In the view of the evidence most favorable to the plaintiff, the defendant had provided no planking on the left, and on the right had provided one or two boards obstructed by protruding beams.

We cannot say that such a walk makes out compliance with the defendant's duty. The statute requires that the contractors or the owners "shall thoroughly plank over the entire tier of iron or steel beams and extending not less than six feet beyond such beams on which the structural iron or steel work is being erected" (Labor Law, sec. 20; Consol. Laws, chap. 31; *Drummond v. Norton Co.*, 156 App. Div. 126; 213 N. Y. 670). Whether this had been done, was a question for the jury. It is not enough to show that an experienced ironworker might be able to walk without harm upon a bridge made of two planks, or even of one, and this whether unobstructed or obstructed. He might be able to do the same though there were no planks at all, by following the iron framework. That does not mean that his path would be safe. The very purpose of the statute was to guard him from such dangers. The beams are not merely to be planked here and there. They are to be "thoroughly" planked. The worker, in going his way about his work, is to be offered more than a choice of dangers. He is to have a way that is free from danger, to the extent that thorough planking of open spaces will give assurance of protection. Nor does the master discharge his duty by throwing the boards down, and then closing them to passage. The

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duty to lay the planking imports a duty to maintain it free from unreasonable obstruction. Only then can it fulfill its function as one of the ways to be followed by the workman in his course about the building (*Nappa v. Erie R. R. Co.*, 195 N. Y. 176, 182). If part of the way is impassable, the part left open must be so large that it will not elude the eye of reasonable diligence, and so protected that, if observed, it may be followed with reasonable security. We are unwilling to hold that two planks, placed as were these, and impeded as were these, establish, as a matter of law, the fulfillment of the master's duty. The plaintiff might well believe that in climbing over the beams, piled, as he supposed, with the care which custom required, he was choosing the safer course.

Other rulings are pressed upon us by the defendant as sufficient, in any event, to require a new trial. We find no error to the prejudice of the defendant in any of them. There was none in the examination of the witness Gansler. The cross-examination opened the door to a full disclosure of everything said and done when Gansler was approached and his testimony solicited (*Nowack v. Met. Street Railway Co.*, 166 N. Y. 433; *Lacs v. Everard's Breweries*, 170 N. Y. 444; *People v. Bertolini*, 218 N. Y. 584, 586). There was none in the disposition of the requests to charge. They are too numerous to be reviewed in an opinion, but for illustration, we refer to one of them. The court was asked to charge: "There is no evidence that the defendant was not proceeding with the planking of the floor on which the plaintiff was hurt with all possible speed." Whether the work was going forward with due diligence, was a question of fact. The defendant's witnesses admit that in the section of the building where the accident occurred, the work of planking had stopped, and was not to be resumed. If open spaces remained, there was a duty yet undone. Other requests which the court declined to grant, involved a like encroachment upon the province of the jury.

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The judgment of the Appellate Division should be reversed, and that of the Trial Term affirmed, with costs in the Appellate Division and in this court.

COLLIN, HOGAN, POUND and ELKUS, JJ., concur;
HISCOCK, Ch. J., absent; McLAUGHLIN, J., not sitting.
Judgment reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. TITLE GUARANTEE AND TRUST COMPANY, Appellant.

Corporations — practice of law by corporation in violation of statute (Penal Law, § 280) — when drawing of bill of sale and chattel mortgage by title guarantee and trust company not a violation of the statute.

1. A corporation which, on a single occasion without giving any advice leading to and consummated therein, prepares a bill of sale and chattel mortgage by filling out blanks upon and in accordance with the specific direction of a purported customer, is not rendering legal services or holding itself out as entitled to practice law.

2. Defendant printed and kept for distribution a booklet of which the cover and each page were entitled, "Fees for the Examination of Titles." There was contained in it the statement, "In all counties, fees for drawing and recording papers and fees for surveys are in addition to the regular charges. Survey charges are found on pages 17-28 and charges for drawing and recording papers on pages 29 and 30." On page 29, which had the additional heading, "Average Charges for Drawing Papers," was found the item, "Bill of Sale (Brooklyn & Queens) \$3.00." Two detectives visited the appellant's place of business. They explained to one of appellant's employees that one of them was selling a store to the other for a given sum and that he desired a bill of sale and chattel mortgage to be drawn. He gave to the employee in response to his request therefor a list of the merchandise which it was claimed was involved. This employee then passed the detectives to another employee who took and filled out in pencil blank forms of a chattel mortgage and bill of sale, which do not appear to have been prepared by the appellant, and gave them to a stenographer to be finally filled out. This stenographer returned them to the last employee who looked them over, placed a seal on them, inquired the rate of interest and stated that the date of execution which was left blank could be filled in when the papers were executed. For thus preparing these papers fees were charged and paid. The cor-

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poration has been convicted of a violation of section 280 of the Penal Law prohibiting the practice of law and rendition of legal services by a corporation. *Held*, that the given acts did not constitute practice of law or rendition of legal services and were not such acts as had been committed to the exclusive charge of attorneys but were those which might be performed by a layman at the time these acts were committed without being subject to criminal punishment. *Held, further*, that in the light of all of the evidence derived from this booklet the price advertised for drawing bills of sale is to be regarded as applicable to those which might be lawfully prepared as an incident to its regular business and is not to be regarded as an advertisement holding out the appellant as soliciting and engaged in the business of drawing bills of sale in such manner as would amount to the practice of law. (*People v. Alfani*, 227 N. Y. 334, distinguished.)

People v. Title Guarantee & Trust Co., 180 App. Div. 648, reversed.

(Argued May 23, 1919; decided December 9, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 14, 1917, which affirmed a judgment of the Court of Special Sessions of the city of New York convicting the defendant of a violation of section 280 of the Penal Law by practicing law without a license.

The facts, so far as material, are stated in the opinion.

Charles E. Hughes, Isidor J. Kresel, Harland B. Tibbets and James P. Judge for appellant. The filling out and delivery of blank forms of bill of sale and chattel mortgage in the circumstances of this case did not constitute practicing law within the prohibition of section 280 of the Penal Law. (*Matter of Percy*, 36 N. Y. 653; *Tiger v. Western Investment Co.*, 221 U. S. 286; *Matter of Co-operative Law Co.*, 198 N. Y. 479; *Matter of City of New York*, 144 App. Div. 107; 204 N. Y. 625; *U. S. Title Guaranty Co. v. Brown*, 86 Misc Rep. 287; 166 App. Div. 688; 217 N. Y. 628; *People ex rel. Trojan Realty Corp. v. Purdy*, 174 App. Div. 702; *People ex rel. Floersheimer v. Purdy*, 221 N. Y. 481; *Matter of Bensel*, 68 Misc. Rep. 70; *Meisel & Co. v. National Jewelers' Board of Trade*, 90 Misc. Rep. 19; *Matter of Associated*

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Lawyers Co., 134 App. Div. 350.) The defendant cannot be held criminally responsible for acts of its employees which were not only unauthorized but were contrary to express instructions. (*New York Central Railroad v. U. S.*, 212 U. S. 481; *People v. Sheffield Farms*, 149 App. Div. 923; 206 N. Y. 79; *People v. New York Centadrink Co.*, 152 App. Div. 912; 207 N. Y. 736.)

Harry E. Lewis, District Attorney (*Ralph E. Hemstreet* and *Harry G. Anderson* of counsel), for respondent. The acts defined in the information and with the commission of which the appellant was charged, constitute practicing law within the meaning of section 280 of the Penal Law, and the exceptions specified in that section do not apply. (*Morgan v. Van Ingen*, 2 Johns. 204; *Cornell Bank v. Varnum*, 49 N. Y. 269; *People v. People's Trust Co.*, 180 App. Div. 494; *People v. Taylor*, 56 Col. 441; *People v. Schreiber*, 250 Ill. 345; 22 Am. & Eng. Ency. of Law [2d ed.], 785; *State v. Paul*, 56 Neb. 369; *Bibber v. Simpson*, 59 Me. 181; *State v. Heffernan*, 28 R. I. 20; *State v. Wilhite*, 132 Iowa, 226; *People v. Mulford*, 140 App. Div. 716; 202 N. Y. 624; *People v. Phippin*, 70 Mich. 6.) Although the appellant is a corporation organized for the purpose of examining and guaranteeing titles to real property, it does not come within any of the exceptions in the statute. The acts complained of by the prosecution cannot be performed by it. (*Matter of Co-operative Law Co.*, 198 N. Y. 479; *U. S. Title Guaranty & Trust Co. v. Brown*, 86 Misc. Rep. 287; *Gaulie v. Solicitors' L. & T. Co.*, 9 Pa. Co. Ct. 634.) The acts charged in the information are not necessarily incident to the appellant's charter powers. (*Matter of Co-operative Law Co.*, 198 N. Y. 479; *Ehmer v. Title Guarantee & Trust Co.*, 156 N. Y. 10; *Trenton Co. v. Title Guarantee & Trust Co.*, 50 App. Div. 490; *People ex rel. Third Ave. R. R. Co. v. Newton*, 112 N. Y. 396; *Mayor v. Manhattan Ry. Co.*, 143 N. Y. 1.)

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HISCOCK, Ch. J. The appellant, originally incorporated under another name, was authorized "to guarantee bonds and mortgages and titles to real estate;" and "to make and cause to be made and to purchase and to pay for all such searches, abstracts, indices, maps and copies of records as the trustees thereof may deem necessary," and for a long time has been engaged in the prosecution of this business.

It has been convicted of a violation of section 280 of the Penal Law prohibiting the practice of law and rendition of legal services by a corporation and of which section the presently material provisions read as follows: "It shall be unlawful for any corporation * * * to hold itself out to the public as being entitled to practice law, or to render or furnish legal services or advice, or to furnish attorneys or counsel or to render legal services of any kind in actions or proceedings of any nature or in any other way or manner, or in any other manner to assume to be entitled to practice law, * * *. This section shall not apply to any corporation * * * lawfully engaged in the examination and insuring of titles to real property, * * * (and as amended in 1916). But no corporation shall be permitted to render any services which cannot lawfully be rendered by a person not admitted to practice law in this state."

The evidence upon which if at all the conviction of appellant must rest is in substance as follows:

Appellant printed and kept for distribution a booklet of which the cover and each page were entitled "Fees for the Examination of Titles." There was contained in it the statement "In all counties, fees for drawing and recording papers and fees for surveys are in addition to the regular charges. Survey charges are found on pages 17-28 and charges for drawing and recording papers on pages 29 and 30." On page 29 which had the additional heading "Average Charges for Drawing Papers" was

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found the item "Bill of Sale (Brooklyn & Queens) \$3.00."

On the occasion of the commission of its alleged offense two detectives employed for that purpose visited the appellant's place of business in Brooklyn. Following directions given in answer to their inquiries they came to one of appellant's employees to whom one of the detectives explained that he was selling a store to the other for a given sum of which part was to be paid in cash and that he desired a bill of sale and chattel mortgage to be drawn. He gave to appellant's employee in response to his request therefor a list of the merchandise which it was claimed was involved. This employee then passed the detectives to another employee who took and filled out in pencil blank forms of a chattel mortgage and bill of sale, which do not appear to have been prepared by the appellant, and gave them to a stenographer to be finally filled out. This stenographer returned them to the last employee who looked them over, placed a seal on them, inquired the rate of interest and stated that the date of execution which was left blank could be filled in when the papers were executed. For thus preparing these papers fees were charged and paid.

There was evidence that on some subsequent occasion some employee of appellant prepared some other instrument of the same general kind as those involved in this proceeding.

In the consideration of the substantial and final question presented to us we can readily eliminate certain provisions of the statute and certain questions of evidence which have been a subject of discussion. Manifestly the provision in the statute that it "Shall not apply to any corporation * * * lawfully engaged in the examination and insuring of titles to real property" is not to be taken literally. So far as concerns this case small controversy if any arises in respect of its meaning. On the one side it is not seriously denied that it would

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permit appellant, or save to it the right, to do the acts which are involved here if they were an incident to its business and were necessary to place in insurable condition a title which was submitted to it for guaranty. On the other hand it is not argued that it would enable appellant to prepare the instruments which on this occasion it did prepare if they were not thus incidental to and connected with the conduct of its authorized business, and were otherwise prohibited.

Under this interpretation of its powers we think that the evidence furnished by the booklet referred to is ineffective to sustain the present conviction. We think that in the light of all of the evidence derived from this booklet the price advertised for drawing bills of sale is to be regarded as applicable to those which might be lawfully prepared as an incident to its regular business and is not to be regarded as an advertisement holding out the appellant as soliciting and engaged in the business of drawing bills of sale in such manner as would amount to the practice of law. Also, in the view which we take, the evidence that subsequently a similar instrument was prepared by appellant's employees is of no importance. We do not think that there is a word of evidence which fairly sustains the contention of the prosecution that appellant's employees were asked to or did give legal advice leading to or in respect of the instruments which were prepared.

So, stripped of inconclusive features and freed from unsupported claims of evidence, and eliminating any consideration of the principle of *ultra vires* the bare and decisive inquiry becomes whether a corporation which, without giving any advice leading to and consummated therein, prepares a bill of sale and chattel mortgage by filling out blanks upon and in accordance with the specific direction of a purported customer is rendering legal services or holding itself out as entitled to practice law. Under the circumstances of this case the general

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inquiry really is reduced to the narrow one whether this amounted to rendering legal services, for as we have pointed out there is no evidence that the appellant held itself out as entitled to practice law unless it did so by performing legal services whereby law would be practiced. I think that a negative answer must be given to this inquiry.

In approaching the decision of the question and at the outset we ought to consider what must have been the purpose of the legislature in enacting the statute. That purpose seems obvious. There are certain fundamental requirements and features which according to our conception in this state attend and surround the practice of law and rendition of truly legal services. These are the possession of sufficient knowledge and skill, the existence of a relationship of trust and confidence upon which the client may securely rely, and the power of courts to use summary proceeding if necessary to enforce on the part of the attorney observance of the obligations and duties growing out of this relationship. A corporation could not adequately comply with and subject itself to these requirements if there were no penal statute. Through the employment of attorneys as its agents it might fairly meet the requirements of knowledge, skill and ordinary legal responsibility, but it could not establish a relationship of confidence and be subject to summary control as an individual attorney can. (*Matter of Co-operative Law Co.*, 198 N. Y. 479.) Therefore, the statute undertakes by its prohibitive provisions to forbid a corporation to attempt or pretend to do what it cannot satisfactorily or fully do, by holding itself out as an attorney and by professing to perform services of such a nature that their performance ought to be safeguarded by those principles and methods which can be applied to an individual and cannot be applied to a corporation. This purpose to prevent a corporation from simulating the character of an attorney and from essaying to render such services is clearly indicated by the

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language of the statute. The corporation is forbidden to practice or appear "as an attorney at law" or to make it a business to practice "as an attorney at law" or "to assume to be entitled to practice law" or "to assume, use or advertise the title of lawyer or attorney, or attorney at law, or equivalent terms in any language in such manner as to convey the impression that it is entitled to practice law."

On the other hand no convincing reason is suggested why a corporation should be punished for performing an act which because of simplicity and lack of confidential character it has not been thought necessary to confide to the exclusive care of attorneys, but which may be performed by a layman. Not only common sense, but the wording of the statute itself, dictates this view. This appears in that amendment to the statute which after provisions that the section should not apply to corporations in certain cases reads: "But no corporation shall be permitted to render any services which cannot lawfully be rendered by a person not admitted to practice law in this state." This sentence characterizes the purpose of the entire statute and outlines the final test. Various direct and specific prohibitions and exceptions conducive of special exceptions like that applicable to appellant have been enacted but in the end we come to the controlling declaration that whatever else may or may not have been said a corporation shall not be permitted to do anything in the way of practicing law or rendering legal services which could not be performed by a layman. That sums up the final legislative thought and suggests the standard by which if there be inadvertence or doubt elsewhere the character of a given act may be measured.

Thus in the light of this apparent purpose of the statute and in the absence of specific definitions it seems that the best and controlling test by which to determine whether the given acts constituted practice of law or rendition of legal services is by the answer to be given

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to the underlying inquiry whether such acts were ones which had been committed to the exclusive charge of attorneys or were those which might be performed by a layman. In this inquiry I do not regard it as decisive that an act is one which is commonly performed by an attorney. That might be a matter of habit or convenience. The inquiry is rather whether it is one which might lawfully be performed by a layman. This is to be decided by the nature of the act and not by the identity of the individual who most frequently performs it. That in effect has been determined many times when the courts have refused to lay their hands summarily upon an attorney for the purpose of correcting transgressions in a transaction which was not undertaken by him in his character of attorney.

The appellant has argued with much vigor and learning the proposition that notaries public and scriveners in foreign countries, especially England, without being admitted to the bar, from time immemorial have been permitted to do conveyancing, and from these historical facts draws the conclusion that by analogy notaries public and laymen are entitled to draw conveyances in this state. The history of notaries and scriveners does somewhat support this view. While these men were compelled to prepare for their avocation and their admission and practices were subject to rules and regulations they nevertheless were not fully admitted members of the legal profession and therefrom flows the inference that while it was thought necessary that they should have preparation it was not regarded as necessary that they should be fully and completely members of the legal profession in order to render these services.

But I think there is a stronger argument in favor of the contention that a layman at the time of these occurrences was permitted to draw such simple instruments as those here involved were without being subject to criminal punishment.

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We may take judicial notice of a widespread custom which has prevailed from time out of memory in this state, and doing so we know that laymen have been accustomed to draw such instruments, not merely as a matter of accommodation for friends and neighbors, but for pay. It probably would not be too much to say that in many rural communities more were drawn by laymen than by attorneys and of course if it was lawful for a layman to draw such an instrument in such a community it was also lawful in a more urban one. While the legislature might differentiate those conditions, we could not. Moreover such practice has not been confined to such communities. We know that in cities constantly men engaged in the real estate business and banks have prepared for their customers such instruments without doubt or criticism.

The legislature when it enacted not only section 280 of the Penal Law, which we have been considering, but also section 270 relating to the practice of law by an individual without being admitted and registered, was charged with the same knowledge of prevailing customs and practices with which we are chargeable. Its members knew, oftentimes doubtless by practical and personal observation and experience, that laymen throughout the state were rendering such services as are here involved. Not only by practice and custom but by inherent privilege they had the right to do this unless forbidden by statute and if the legislature intended to prohibit a widespread practice and establish a new rule it was its duty to say so clearly and unmistakably in the statute relating to the practice of law and rendition of legal services by individuals. It did not say so and in my opinion there is not to be found in that section of the Penal Law any provision against the rendition of such services by an individual. We think the same idea is emphasized as in section 280 that an individual who is not admitted to practice must not assume the character of an attorney

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at law. He is forbidden to practice or appear "as an attorney at law or as an attorney and counselor at law" or to make it a business to practice "as an attorney at law or an attorney and counselor at law" or to hold himself out to the public as being entitled "to practice law as aforesaid or in any other manner" or "to assume to be an attorney or counselor at law." But there is nothing which can fairly be regarded as indicating an intention to abolish an existing and widespread practice and to prevent a layman as such and without any simulation of or pretense to the character of an attorney from drawing a simple instrument as instructed by his customer and not involving or predicated upon any legal advice then given.

When subsequently the legislature, chargeable with knowledge of this practice and of the fact that under the enactment of section 270 of the Penal Code, it was still permissible for a layman to draw such an instrument, enacted section 280 for the purpose and in the language and with the qualifications which we have mentioned, we do not think it would be a fair or reasonable interpretation to hold that it intended to prevent a corporation from drawing a simple bill of sale or chattel mortgage, which from a legal standpoint could have been drawn by any layman in the state. It was easy to cover and prohibit such transactions if so intended and we do not think that we should strain to discover such intention in the absence of some language clearly expressing it.

In seeking to reach a proper decision of the question before us we ought not to ignore considerations of public convenience and economy as involved in the every day transaction of ordinary business matters. If provisions of the statute were so clear that their meaning was beyond the range of doubt or debate of course we could not be influenced by any such consideration. But they are not. The very able argument which has been made on each side is sufficient evidence that persuasive reasons might be

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marshalled in favor of a decision of the question in either way. Under those circumstances we can consider practical results. As has been indicated we can take notice of the widely existing practice of laymen to prepare simple instruments like those before us. If it is unlawful to fill out the blank form for a chattel mortgage or bill of sale, it would be equally so to prepare various other simple instruments which are now commonly prepared by laymen and banks and it would be necessary to undergo the trouble and expense of summoning an attorney to perform acts which really do not require his services. Again, I say, that if the legislature intended to command this change in the transaction of ordinary business it should have said so clearly. There can be no debate of the proposition that the standards of the legal profession should be maintained at a very high level. Every one who has had experience knows that much more harm comes to the public from the ignorance and carelessness than from the intentional misconduct of those who have succeeded in securing the right to practice law. But this does not furnish a reason for so broadening the meaning of a statute as to confer upon attorneys the exclusive right to render certain services as incapable of performance by a layman when common and long-established practice points in a different direction and the legislature has not fairly indicated an intent to change existing conditions.

We appreciate also that it may be difficult to draw a logical and satisfactory dividing line under the statute between such acts as are before us and some other one. It very well may be that the difference is so marked between the transaction of preparing a simple chattel mortgage or bill of sale and the preparation and execution of a complicated deed of trust or will that there would be no difficulty in locating these on different sides of the line. It may be much more troublesome to make the location in some other case. It would be worse than

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futile to attempt to formulate a general and universal rule which would cover all cases. We must take care of the problems of the future when they arise. We at least settle those which are now presented to us.

In conclusion, what I have said is not to be interpreted in any manner as the expression of an opinion upon the question which would arise if a corporation by words or acts should hold itself out as engaged in the business of preparing instruments of the character involved in this proceeding or other ones and should so do. In the case of *People v. Alfani*, decided herewith, we have held that a layman by holding himself out as engaged in the preparation of legal instruments and by giving advice in connection with their execution furnished evidence by which he could be convicted of holding himself out to the public as being entitled to practice law in violation of section 270 of the Penal Law. It is quite possible that a corporation by some such conduct might furnish evidence whereby it could be convicted of a violation of the statute relating to corporations. That question does not seem to me to be presented by the present case and, therefore, has not been considered.

For these reasons the judgments should be reversed and the information dismissed.

POUND, J. (concurring). I agree that the People have failed to make out a case but I desire to add a few words to make clear the reasons by which I have reached that conclusion.

Much may be said on the historical distinction between lawyers and scriveners and notaries, as has been admirably done by PUTNAM, J., in the dissenting opinion (180 App. Div. 654) below and in *People v. Alfani* (186 App. Div. 468). Doubtless many individuals, unlearned in the law, occasionally draw deeds, wills, mortgages and other instruments without rendering legal services in the common acceptance of the term who would be startled to learn

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that they had criminally engaged in the practice of law. The test of the legislative intent is to be found, however, in the present day evil which the legislation aims to correct. The evil addressed seems to be, both in the case of the individual and the corporation, the practice of rendering, with some continuity, services of the character now generally performed by lawyers as a part of their ordinary routine — not merely trying cases, giving advice or preparing difficult papers, but ordinary conveyancing as well. Arguments based on the ancient rivalry of the attorneys and the scriveners; the unique rights and privileges of the continental notary and the convenient custom of laymen to draw wills and other legal instruments must give way to a consideration of the well-known work of the modern law office. The legislation is in aid of the lawyers, and for the protection of the public, and is antagonistic to the policy which would permit any one to act habitually as a servicer or conveyancer. The question is not one of sound public policy but is one of legislative policy merely. The lawyer's profession or calling does not cover the preparation of all papers of legal significance, such as promissory notes, for which lawyers are not as a rule resorted to, but it does, I think, cover the preparation of bills of sale and chattel mortgages. I am unable to rest any satisfactory test on the distinction between simple and complex instruments. The most complex are simple to the skilled and the simplest often trouble the inexperienced. Skill is sought when another is employed to do the work. If the blank forms used by the trust companies are prepared or approved by their legal counsel then, when the clerks fill them out, the corporation tacitly advises the client that the forms are proper and sufficient for the purpose and one would expect that he was getting good legal advice, indirectly, if he had papers thus prepared. So the giving of oral advice is not a satisfactory test. If such services as were rendered

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+ in this case are customarily rendered, I think that they should be characterized as legal services. This does not imply that a real estate broker may not prepare leases, mortgages and deeds, or that an installment house may not prepare conditional bills of sale, in connection with the business and as a part thereof. The preparation of the legal papers may be ancillary to the daily business of the actor or it may be the business itself. The emphasis may be upon the services of the broker or the business of the trader or it may be upon the practice of law.

In the case before us, I think that the defendant may not make it a business to prepare even simple legal papers for all who apply, independently of its chartered powers. The corporation is not, however, chargeable criminally for the isolated act of its employees as here charged, which might well occur otherwise than as an incident of a general practice. On the evidence, it does not hold itself out as preparing legal instruments generally but only in connection with its legitimate business.

For these reasons, I concur in the result that the judgment should be reversed and the information dismissed.

CRANE, J. (concurring). I agree with the chief judge in this case but desire to express my reasons for so doing. In my judgment the Title Guarantee and Trust Company could draw any papers or legal instruments necessary or incident to its chartered powers, that is, it could draw a chattel mortgage in connection with its closing of a title or the placing of a mortgage. This is not prohibited by section 280 of the Penal Law. The little pamphlet or circular showing a list of prices for drawing papers must be taken at its face value in the absence of other evidence and considered to be the charges made for drawing such instruments when necessary or incident to the real estate transactions conducted by the company. It then remains to be determined whether the single act of drawing a chattel mortgage not connected with any other work by the company is an offense.

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In the first place the company disavows any intention or attempt to conduct a business of drawing papers whether legal instruments or otherwise disassociated from its regular and ordinary business.

Section 280 of the Penal Law makes it unlawful for any corporation to do the following:

1. To practice as an attorney at law in any court.
2. To make it a business to practice as an attorney at law in any court.
3. To hold itself out to practice law or to render legal services.
4. To furnish attorneys.
5. To render legal services in any way or manner.
6. In any other manner to assume to be entitled to practice law.

The aim of this section is at a practice or a business to do the prohibited act. The single occurrence is not the evil sought to be prohibited. The words "to render legal services of any kind in any way or manner" must be read in connection with the whole provision and have reference to a practice or a business of rendering legal services in any manner. Should the defendant advertise or conduct a business of drawing chattel mortgages or legal papers unconnected with its other authorized work it would be violating this law and be guilty of a misdemeanor.

CARDOZO, J., dissents upon the ground that accepting, as he does, the conception of legal services embodied in Judge POUND's opinion, he believes that there was evidence before the triers of the facts sufficient to sustain the finding of a violation of the statute. ANDREWS, J., and POUND and CRANE, JJ., in separate memoranda, concur with HISCOCK, Ch. J.; CHASE, COLLIN and CARDOZO, JJ., dissent in memorandum by CARDOZO, J.

Judgments reversed, etc.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. WILLIAM MARWIG, Appellant.

Murder — killing of proprietor of store which defendant and a companion had attempted to rob — when fatal shot was fired by companion of defendant after they had left the store and were trying to escape, defendant is not guilty of murder in the first degree unless the jury finds deliberation and intent to kill — whether defendant and his companion were still conspirators and violence used was part of their scheme question for the jury — erroneous charge.

1. Defendant has been convicted of murder in the first degree. He did not himself actually kill decedent; a companion fired the fatal shot to release defendant from the clutches of decedent after they had entered his jewelry store for the purpose of committing robbery or larceny. A passer-by who saw defendant taking a watch and chain out of the show window stepped to the door of the store. Defendant ran out into the street, and his companion, holding up the passer-by with his pistol, also made his escape. As defendant was going along the sidewalk away from the jewelry store and past the adjoining store the proprietor of the jewelry store ran after him and seized him. Thereupon defendant's companion shot and killed the proprietor and both ran away. Both were indicted, but tried separately, and defendant was convicted of murder in the first degree upon the theory that he and his companion were engaged in the commission of robbery when the decedent was shot. There is no evidence that defendant had any stolen property with him at the time of the shooting, or the watch and chain which he was seen to lift from the show window, nor was the value of the watch and chain proved to show that if a larceny was committed or attempted it was a felony and not a misdemeanor. Under this evidence defendant and his companion had completed their felonious act, or had desisted from the attempt to commit it, and were running away, and at the time of the shooting were not engaged in the commission of a robbery. It was, therefore, error for the trial court to submit the case to the jury without instructing them to determine the question of pre-meditation and deliberation and intent to kill; it was a question of fact for the jury whether or not at the time of the shooting the two men were still conspirators and the violence used within the purpose and object of their combination.

2. Counsel for the defendant requested the court to charge: "If this evidence does not show that this shooting occurred while

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the robbery or the attempt at robbery was being made, but was after it was over and abandoned by the persons charged, that they cannot find the defendant guilty as charged in the indictment." The court charged: "Well, the court is perfectly willing to charge that, but with an additional statement: The efforts to escape, if you believe that the evidence satisfies you that a robbery or an attempt to commit a robbery existed, the efforts to escape — and the court is willing to charge it as a matter of law — was all and one a part of a continuous transaction and you cannot divide at a particular point of time when the robbery was complete, in the light of the evidence, as the court understands it, that one of the defendants was jumped upon as he left the store." Held, that the modification made in the additional statement of the court is incorrect and constitutes reversible error.

(Argued October 30, 1919; decided December 9, 1919.)

APPEAL from a judgment of the Supreme Court, rendered February 20, 1919, at a Trial Term for the county of Erie, upon a verdict convicting the defendant of the crime of murder in the first degree.

The facts, so far as material, are stated in the opinion.

Clark H. Timerman and Edward C. Handwerk for appellant. There is no proof that a murder was committed while any robbery was being committed. (Penal Law, § 1044.) The proof shows conclusively that any attempted robbery had been abandoned before the shooting occurred. (*People v. Lawton*, 56 Barb. 126; *People v. Dolan*, 64 N. Y. 485; *People v. Hüter*, 184 N. Y. 237; *People v. Sullivan*, 173 N. Y. 135; *People v. Governale*, 193 N. Y. 581; *People v. Chapman*, 224 N. Y. 463.) It was error for the court to charge that an attempt to escape after an attempt to commit a felony constituted a part of the attempt to commit the felony, and, therefore, justified a verdict of guilty in case they found an attempt to commit a felony had been made. (*People v. Hüter*, 184 N. Y. 237.) It was error for the court to refuse to charge that there was no direct evidence of any prior conspiracy or planning on part of the defendant in this case. (*People v. Chapman*, 224 N. Y. 463.)

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Guy B. Moore, District Attorney, for respondent. The evidence proved that the defendant was guilty of murder with deliberation and premeditation; and that the killing occurred while defendant and Bojanowski were engaged in the commission of a felony, to wit, robbery of the deceased. (*People v. Friedman*, 205 N. Y. 161; *People v. Giusto*, 206 N. Y. 67; *People v. Wilson*, 145 N. Y. 628.) The theory of deliberation and premeditation was properly submitted to the jury. (*People v. Sullivan*, 173 N. Y. 122; *People v. Flannigan*, 174 N. Y. 356; *People v. Morse*, 196 N. Y. 306; *People v. Wilson*, 145 N. Y. 628; *People v. Charo*, 200 N. Y. 316; *People v. Barnes*, 202 N. Y. 77.) There was no error in the charge of the trial court. (*People v. Friedman*, 205 N. Y. 161; Code Crim. Pro. § 542; *People v. Cummins*, 209 N. Y. 283; *People v. Sprague*, 217 N. Y. 373.) The refusal of the court to charge that there was no direct evidence of a prior conspiracy on the part of the defendant did not constitute error. (*People v. Wilson*, 145 N. Y. 628.)

CRANE, J. The defendant has been convicted of murder in the first degree for having killed one George Weitz in the city of Buffalo on the 8th day of November, 1918. The defendant himself did not actually kill Weitz. Walter Bojanowski, a companion of the defendant, fired the fatal shot to release Marwig from the clutches of Weitz who had seized him after the commission of a crime by the two men in Weitz' store. Bojanowski was indicted with Marwig but the defendants were tried separately.

Weitz was the manager of a jewelry store on Genesee street in the city of Buffalo. On the day mentioned, Marwig and Bojanowski entered the store about noon time evidently for the purpose of committing robbery or larceny. Bojanowski had a pistol and a slung shot. What was said or done to Weitz who was in the store at the time is not known but Weitz immediately after their entry ran into an adjoining store through a side door. Marwig was seen by a passerby taking a watch and chain

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out of the show window. Seeing that Marwig was not the regular jeweler this person, named William Kallas, stepped to the door of the store and evidently interrupted the criminals in their undertaking. Marwig ran out into the street and Bojanowski holding up Kallas at the point of his pistol also made his escape. As Marwig was going along the sidewalk away from the jewelry store and past the adjoining store Weitz ran out and seized him and in the ensuing struggle both fell to the ground. Thereupon Bojanowski shot and killed Weitz, released Marwig and both men ran away. Bojanowski was arrested soon after, but Marwig not until the following month.

The evidence shows that Marwig had walked along the sidewalk of Genesee street until he was opposite the doorway of the store next to the jeweler's. There were show windows on each side of this doorway. It was in front of this doorway of the adjoining store that Weitz grabbed Marwig. There is no evidence that he had any stolen property with him at the time or the watch and chain which he was seen to lift from the show window. Neither was the value of the watch and chain proved to show that if a larceny were committed or attempted it was a felony and not a misdemeanor. (Penal Law, §§ 1298, 1299.)

The case was tried upon the theory that Weitz was killed while a robbery was being committed. If such were the fact of course Marwig being present and assisting in the commission of a felony would be guilty of murder in the first degree although he did not do the shooting. Both men would be guilty of murder in the first degree although neither at the time intended to kill Weitz or had premeditated or deliberated upon his death. (Penal Law, § 1044; *People v. Giro*, 197 N. Y. 152; *People v. Schleiman*, 197 N. Y. 383.)

The facts as thus stated, however, present another aspect of the criminal law applicable to the case. If the

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criminals had committed a robbery or a felonious larceny but had been frightened away from the place of the crime, had quit their felonious acts or attempt and were seeking to escape by running away upon the public streets, the death of a person seeking to capture them would not be the killing of a human being by a person engaged in the commission of the felony of robbery or larceny. If it were not, then neither Bojanowski nor Marwig would be guilty of murder in the first degree unless the jury should find that the death was the result of a premeditated design; deliberation and intent to kill would then be requisites of murder in the first degree.

a It is evident that if the criminals had escaped and were a mile away from the place of the crime it could not be said that they were then in the commission of a felony. At what distance from the place of the crime would the felony, committed in the store, end? The rule cannot depend upon some arbitrary measure of distance. It was said to *People v. Hüter* (184 N. Y. 237, 241), that of all the cases to which the attention of this court had been called in which persons had been convicted of murder in the first degree by reason of a killing of a person while the accused was engaged in the commission of a burglary the killing took place upon the premises.

In *People v. Marendi* (213 N. Y. 600, 607) it was said: "Assuming that the defendant fired the fatal shot at Officer Murtha, the truth undoubtedly is that the shooting of O'Connell, if done by the defendant, was to escape the consequences of the earlier completed crime. On that theory the jury might very well have found that the defendant formed the deliberate and premeditated design to shoot any one who got in the way of his escape; but that did not justify the submission of the case to the jury so as to permit a conviction of murder in the first degree for an unintentional homicide, committed without such a design."

As before stated, the defendant in this case was con-

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victed upon the theory that he and his companion were engaged in the commission of robbery when Weitz was shot. Robbery is the unlawful taking of personal property from the person or in the presence of another by means of force or violence. (Penal Law, section 2120.)

It may be that there was sufficient evidence to warrant the jury in drawing the conclusion that robbery was attempted or committed in Weitz' store. Bojanowski had a pistol and slung shot, but there is no evidence that he exhibited them until the witness Kallas entered. It is true that Weitz ran out of a side door into the adjoining store and it is fairly to be presumed that he was frightened. The judge in this case, however, did not charge the jury as to what constituted robbery in any of its degrees.

On the evidence as presented, Marwig and Bojanowski had completed their felonious act or had desisted from the attempt to commit it and were running away, and at the time of the shooting were not engaged in the commission of a robbery. Under such circumstances the judge would be obliged to charge the jury as to premeditation and deliberation and intent to kill.

The learned trial justice evidently intended to do this as in the first part of his charge he covered these matters, but he withdrew the effect of it by his statement that the whole basis of the People's case proceeded upon the theory that the defendant was concerned in and participated in the robbery and he told them the following:

"If you believe that the defendant planned and participated in the commission of the robbery in the jewelry store and his companion armed himself with a revolver, with the intent to shoot any one who opposed their design or interfered with their plan or that of the defendant or that of either of them, then he, the defendant, is chargeable with such deliberation and premeditation as rendered him guilty of murder in the first degree, where, while after committing or attempting to commit robbery, either shoots and kills a person who interferes with him or his

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companion in the effort of either or both of them to escape."

This in effect is the same as saying to the jury that if the defendant participated in the commission of a robbery in the jewelry store and after committing or attempting to commit it his companion shot and killed the manager in an attempt to escape, both would be guilty of murder in the first degree. This was not in line with what has just been said by me. Marwig would not be guilty of murder in the first degree if after the robbery had been committed and not while it was being committed his companion shot and killed Weitz while they were aiding each other in trying to escape unless the jury should find premeditation and deliberation upon the part of Bojanowski. Neither of the men would be chargeable under such circumstances with deliberation and premeditation as a matter of law but it would be a question of fact for the jury.

A request was made by the defendant's counsel in these words:

"If this evidence does not show that this shooting occurred while the robbery or the attempt at robbery was being made, but was after it was over and abandoned by the persons charged that they cannot find the defendant guilty as charged in the indictment."

The court: "Well, the court is perfectly willing to charge that, but with an additional statement: The efforts to escape, if you believe that the evidence satisfies you that a robbery or an attempt to commit a robbery existed, the efforts to escape—and the court is willing to charge it as a matter of law—was all and one a part of a continuous transaction and you cannot divide at a particular point of time when the robbery was complete, in the light of the evidence, as the court understands it, that one of the defendants was jumped upon as he left the store."

Here it will be noticed that the court charged as a

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matter of law that the escaping upon the public streets was a part of the crime of robbery. The modification was, therefore, incorrect.

The acts of Marwig constituted a bold and daring hold-up for which, according to the evidence of this case, he could expect little consideration in public feeling. The law, however, as has frequently been stated, makes no distinction in persons and the worst of men when brought to its bar are to be tried according to uniform and established rules and practice. No departure from these can be said to be harmless because of the seriousness or gravity of the offense or the apparent guilt of the accused. The instructions from the court failed to tell the jury that if after the crime of robbery or larceny, as a felony, the defendants were escaping and the shooting occurred not in the commission of the felony but upon the public streets and after the crime had been completed, the defendant would only be guilty of murder in the first degree if Bojanowski shot with premeditation and deliberation to effect the death of Weitz. But one other element must here be spoken of in order to make Marwig even then guilty of the acts of Bojanowski.

The joint enterprise or conspiracy to commit robbery or larceny must also have extended to and covered the escape or "get away" as it is called. To make one liable for the acts of the other it must have been the intention of the parties not only to aid and assist in the commission of the main felony but also to act mutually and aid each other in the escape. In other words, at the time of the rescue the parties must then have been conspirators (*Ruloff v. People*, 45 N. Y. 213, 217.) The court there said: "When one was detained, being overcome by the opposition, the others returned at the call of their comrade, and the only one in condition to do so, deliberately shot Merrick, who was preventing the escape of one of the confederates, and was cautioned by that confederate, when about to shoot, not to shoot him.

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The jury were authorized to infer that this act was within the general purpose of the confederates. They may have desisted from their larcenous attempts, and yet the full purpose of the combination not have been carried out so long as one of the party was detained and held a prisoner." (See, also, *People v. Wilson*, 145 N. Y. 628.)

In *Rex v. Collison* (4 Carrington and Payne Reports, 565) two private watchmen seeing the prisoner and another man with two carts laden with apples which they suspected had been stolen, went up to them and one walked beside the prisoner and one beside the other man at the same distance from each other and while they were so going along the prisoner's companion stepped back and with a bludgeon wounded the watchman with whom he had been walking. The court said: "To make the prisoner a principal, the jury must be satisfied, that, when he and his companion went out with a common illegal purpose of committing the felony of stealing apples, they also entertained the common guilty purpose of resisting to death, or with extreme violence, any persons who might endeavor to apprehend them; but if they had only the common purpose of stealing apples, and the violence of the prisoner's companion was merely the result of the situation in which he found himself and proceeded from the impulse of the moment, without any previous concert, the prisoner will be entitled to an acquittal."

Thus where several persons have combined together for the purpose of committing a felony and upon an alarm they run in different directions and one of them, being pursued, kills the pursuer, the others cannot be considered as principals in such act. (*Rex v. White*, Russell and Ryan's Crown Cases, p. 99; *Jones v. State*, 14 Ohio Circuit Court Reports, 35 and 47 touch on this point.)

The case of *People v. Knapp* (26 Mich. 112, at page 115) in my judgment correctly states the rule: "It is undoubtedly possible for parties to combine in order to

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make an escape effectual, but no such agreement can lawfully be inferred from such a combination to do the original wrong. There can be no criminal responsibility for any thing not fairly within the common enterprise, and which might be expected to happen if occasion should arise for any one to do it. In other words, the principle is quite analogous to that of agency where the liability is measured by the express or implied authority. And the authorities are quite clear, and reasonable, which deny any liability for acts done in escaping, which were not within any joint purpose or combination." (See, also, *Frank v. State*, 27 Ala. 37 and 1 East P. C. sec. 67, p. 298.)

The instructions given the jury in this case held Marwig for the acts of Bojanowski because they were jointly engaged in the robbery irrespective of whether or not they were acting jointly in the escape. The court said: "My view on the subject or my design on the subject, was, if this jury are satisfied beyond a reasonable doubt that the man who did the killing, irrespective of what his intent may have been, was the companion of this defendant at the time the robbery was committed, or the attempted robbery, then any act on the part of the other individual, that is, the individual who did the shooting, is the act of this defendant, and he is just as responsible in the law as though he had actually done the same himself."

It was a question of fact for the jury as already stated whether or not at the time of the shooting the two men were still conspirators and the violence used within the purpose and object of their combination.

For the reasons here stated, the judgment of conviction should be reversed and new trial granted.

HISCOCK, Ch. J., CHASE, COLLIN and ANDREWS, JJ., concur; HOGAN, J., concurs in result; CARDODOZ, J., not voting.

Judgment of conviction reversed, etc.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. CAIN
O'CONNOR, Respondent, *v.* HENRY J. GIRVIN, as
Chief of Police of the City of Buffalo, et al., Appellants.

Buffalo (city of) — mandamus — patrolman of police force detailed for detective duty, whose designation has been revoked and who has been reassigned to duty as a patrolman, is not entitled to a writ of mandamus reinstating him as detective-sergeant.

Under the charter of the city of Buffalo (L. 1891, ch. 105, § 191; amd. by L. 1912, ch. 198) as it existed before the charter enacted in 1914 (L. 1914, ch. 217), the superintendent of police was authorized to detail for detective duty a certain number of patrolmen who should be the detectives of the police force and be known as detective-sergeants with a salary fixed by the police commissioners, and under such provisions patrolmen were detailed to detective duties and were not required to take a new examination nor did they receive from the commissioners a new appointment, and such details might be terminated at the will of the officer who made them, without preferring charges, or a public hearing thereon, since such revocation of a detail was not a reduction of rank within the meaning of other provisions of the charter. The present charter (L. 1914, ch. 217) did not change the status of detective-sergeants previously appointed under the former charter. It follows, therefore, that a patrolman, who had been designated in 1904 to serve as a detective-sergeant, and served until 1919, when his designation was revoked and he was reassigned to duty as a patrolman, is not entitled to a peremptory writ of mandamus reinstating him as a detective-sergeant.

People ex rel. O'Connor v. Girvin, 188 App. Div. 1000, reversed.

(Argued November 17, 1919; decided December 9, 1919.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 23, 1919, which affirmed an order of Special Term granting a motion for a peremptory writ of mandamus to compel defendants to reassign the relator to duty as a detective-sergeant in the police department of the city of Buffalo.

The facts, so far as material, are stated in the opinion.

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William S. Rann, Corporation Counsel (George J. Feldman of counsel), for appellants. Detective-sergeants of the Buffalo police force are patrolmen detailed to detective duty and may be reassigned to patrol duty in the sound discretion of the commissioner of public safety. (L. 1901, ch. 105, § 191; *Matter of Pritchard*, 51 Misc. Rep. 484; *People ex rel. Buckley v. Roosevelt*, 5 App. Div. 168; *Matter of Sugden v. Partridge*, 174 N. Y. 87.)

Matthew W. Weimar and Henry W. Killeen for respondent. A detective-sergeant of the Buffalo police department has a position superior to and distinct from that of a patrolman and cannot be removed therefrom nor summarily ordered to patrol duty except in pursuance of the provisions of section 251 of the 1916 charter, after the hearing of specific written charges as provided thereby. Section 251 does not create a new position in the police department. (*People ex rel. Sugden v. Partridge*, 174 N. Y. 87; *Fay v. Partridge*, 174 N. Y. 527; *People ex rel. Lahey v. Partridge*, 74 App. Div. 291; *People ex rel. Burns v. Partridge*, 38 Misc. Rep. 697; *People ex rel. Buckley v. Roosevelt*, 5 App. Div. 168; *Matter of Pritchard*, 51 Misc. Rep. 483.)

CARDOZO, J. In February, 1892, the relator, having passed a civil service examination, was appointed a patrolman by the police commissioners of the city of Buffalo. In February, 1904, he was designated by the superintendent of police to act as detective-sergeant. He served as such until February, 1919, when his designation was revoked, and he was reassigned to duty as a patrolman. The legality of this revocation, in default of charges of misconduct, is the question to be determined.

Under the law as it stood before 1914, when the present charter of Buffalo was adopted, there was little, if any, room for difference of opinion. "The superin-

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tendent shall detail for detective duty such patrolmen not exceeding twelve in number * * * as he shall, from time to time select," (Sec. 191 of old charter, L. 1901, ch. 105, as amended by L. 1912, ch. 198). "The patrolmen so detailed shall compose the detectives of the force, and during the time said patrolmen are detailed for detective duty they shall be known as detective-sergeants, and each of them may receive for such detective service such salary as may be fixed by the board, with the consent of the common council" (Sec. 191, *supra*). Under those provisions, detective-sergeants were patrolmen detailed to detective duties. They did not take a new examination, nor receive from the commissioners a new appointment (Sects. 187, 191, 200). They were designated by the superintendent for the discharge of special duties, just as they might have been detailed to preserve order at the court house or at places of amusement, or to render other services less rigorous than patrol duty upon the streets. Such details might be terminated at the will of the officer who made them. The faithful patrolman, if he turned out to be a poor detective, might be sent back to service on patrol. There was, it is true, a provision even then that all members of the police force should "hold office during good behavior" and should be "liable to removal or reduction in rank" only upon written charges and public hearing (Sec. 192). But revocation of a detail was not reduction in rank within the meaning of the statute (*People ex rel. Buckley v. Roosevelt*, 5 App. Div. 168). This conclusion would have been necessary though there had been no other expression of the legislature's purpose, for it followed as a deduction from the essential nature of a detail. It was made still plainer, however, by a later section (Sec. 200), which reiterated the distinction between details and appointments, and prescribed the evidence for each. "The board shall issue to each member of the police force a proper warrant of appointment, signed by the

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board and countersigned by the clerk which warrant shall contain the date of his appointment and his rank. Each patrolman detailed to duty as a detective shall have issued to him a written order of detail, signed by the superintendent and countersigned by the clerk of the board, and the revocation of such detail shall be issued in like manner" (Sec. 200).

A new charter for the city of Buffalo was enacted by the legislature in 1914, and took effect on January 1, 1916 (L. 1914, ch. 217). The relator insists that detective-sergeants have been invested with a new status by force of its provisions. This result is said to follow from the failure to re-enact sections 191 and 200 of the old charter, and the substantial re-enactment of section 192 as section 251 of the new one. Section 191, as we have seen, authorized the detail of patrolmen to detective duty, and thereby established the class of detective-sergeants. By the failure to re-enact that section, the legislature did not intend, however, to terminate the class or change the method of selection. This is plain from two circumstances. One is that in sections 250 and 250a, it recognized the class as still existing. The other is that in section 250, it preserved the rules and regulations of the department then in force and gave them the force of law until the council of the city should otherwise prescribe. These rules and regulations are in evidence, and they characterize detective-sergeants as patrolmen detailed to serve in the bureau of detectives, and prescribe the mode of designation. The failure to re-enact section 200 of the old charter is also, we think, without significance, or at least without any that is controlling. That section was not the source of the power to terminate a detail. Its only function was to prescribe the form in which appointments and details and their revocation should be certified. That subject is now adequately regulated by the rules and regulations of the department, which under section 250 of the present charter have the

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force of law. Equally without controlling significance is section 251, which provides that members of the police force in office when the act takes effect, "shall continue in office and hold their respective positions, unless reduced in rank or removed," and prohibits removal or reduction in rank "except upon written charges specifying in detail the accusation made." That prohibition is nothing more than a re-enactment of section 192 of the old charter, and should receive a like construction. The distinction is still one between permanent positions and temporary assignments. There is nothing in the statute to indicate an intention that new positions should be established, and that the system of details should be abolished. This becomes the more certain when we recall the provisions of sections 250 and 250a. Detective-sergeants are there recognized as an existing class with known and established attributes. Section 250 authorizes the mayor to "divide the sergeants and patrolmen of such force (but not including detective-sergeants) who may be on duty in the open air, on the streets or other public places of the city, into three platoons," and section 250a provides that "the tours of duty of sergeants, and patrolmen (not including detective-sergeants) on duty in the open air," shall be changed at least once in each month. In thus recognizing a class which it did not create or define, the legislature must be presumed to have spoken with knowledge of existing conditions, to have used words with their existing meaning, and to have preserved the class with its existing status. Detective-sergeants thus remained what they had always been before. They were patrolmen detailed to duty as detectives. They were confirmed in the rights which were already theirs, and in no others. We have little doubt that this construction of the statute promotes the discipline and efficiency of the police force, and ought, therefore, to be preferred if the meaning is uncertain. The case is unlike *Matter of Sugden v. Partridge* (174

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N. Y. 87), where the statute provided that detective-sergeants in the city of New York should hold a distinct rank and should not be reduced therefrom except in the manner provided by law for sergeants and other officers. If the legislature wished to confer like privileges upon detective-sergeants in Buffalo, it should have spoken with equal clearness. Until it does so, we must hold that their status is unchanged.

The relator argues that the question has ceased to be substantial, because, since the decision of the Appellate Division, he has, on his own application, been retired on a pension (Charter, section 264, subd. 3). The salary to be paid to him will, however, be affected by our ruling. If the mandamus stands, he must be compensated at one rate; if it is set aside, at another. The controversy remains a real one.

The order of the Appellate Division and that of the Special Term should be reversed, and the application for a mandamus denied, with costs in all courts.

HISCOCK, Ch. J., CHASE, POUND, McLAUGHLIN and ANDREWS, JJ., concur; CRANE, J., dissents.

Orders reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. GEORGE M. DEVINNY, Appellant.

Crimes — practicing medicine without being registered and licensed as required by statute (Public Health Law, § 161) — when indictment accusing defendant of committing such crime need not negative exception to such statute — when such indictment defective for failing to name the individual treated by defendant.

1. It is the general rule that in dealing with a statutory crime exceptions must be negatived by the prosecution and provisos utilized as a matter of defense. The two classes of provisions — exceptions and provisos — frequently come closely together and the rule of

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differentiation ought to be so applied as to comply with the requirements of common sense and reasonable pleading.

2. Where an indictment accused the defendant of the crime of practicing medicine as defined by section 160 of the Public Health Law (Cons. Laws, ch. 45) without being registered and legally authorized so to do, as required by section 161 of the statute, but did not negative the cases enumerated in section 173 of the statute which enacts that the article in which both sections are found shall not be construed to affect a large number of specified persons, the indictment is not defective for that reason, since under the circumstances of this case the provision in question assumes more the nature of a proviso than of an exception.

3. Although there are many cases in which an indictment, which charges a statutory crime in the words of the statute, is sufficient, yet where an indictment charges a defendant with the crime of practicing medicine without a license, by diagnosing, treating or offering to diagnose or treat a disease of an individual, it is necessary that the indictment name, or excuse naming by a proper allegation, the individual treated by defendant.

People v. Devinny, 188 App. Div. 986, reversed.

(Argued October 21, 1919; decided December 12, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered July 3, 1919, which affirmed a judgment of the Albany County Court rendered upon a verdict convicting the defendant of the crime of practicing medicine without a license.

The facts, so far as material, are stated in the opinion.

Andrew J. Nellis for appellant. The indictment did not charge any acts constituting a crime. (*Simmons v. United States*, 96 U. S. 360; *United States v. Hess*, 124 U. S. 483; *State v. Carey*, 4 Wash. 424; *O'Connor v. State*, 46 Neb. 157; *County of Steuben v. Wood*, 24 App. Div. 442; *People v. Firth*, 157 App. Div. 492; *State v. Thomas*, 111 La. 804; *Crawford v. Lozano*, 48 S. W. Rep. 538; *People v. Silver*, 158 App. Div. 217; *Wood v. People*, 53 N. Y. 511.) The indictment should

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have negatived the exceptions. (*Fleming v. People*, 27 N. Y. 332; *People v. Spees*, 18 App. Div. 618; *People v. Bradford*, 178 App. Div. 371; *Rowell v. Janvrin*, 151 N. Y. 67; *State v. Burns*, 181 Iowa, 1089.)

Harold D. Alexander, District Attorney, for respondent. An allegation that defendant unlawfully practiced medicine, at a certain time and place, without a license, etc., is a complete statement of the act. (*People v. Ellis*, 162 App. Div. 288; *People v. Firth*, 157 App. Div. 492; *People v. Trainor*, 57 App. Div. 422; *People v. Hoyt*, 145 App. Div. 698; 205 N. Y. 523; *People v. Williams*, 149 N. Y. 1; *People v. Corbalis*, 178 N. Y. 516; *People v. Abelson*, 162 App. Div. 674, 678; 218 N. Y. 716.) The qualifying matters in the latter part of the statute should not be negatived in an indictment, as they are no part of the offense. (*People v. Sullivan*, 173 N. Y. 122; *People v. Maine*, 51 App. Div. 142; 166 N. Y. 50, 52; *Rex v. Pearce*, Russ. & Ryan Crown Cases, 174; *State v. R. R.*, 50 W. Va. 235; *Fleming v. People*, 27 N. Y. 329; *People v. Conroy*, 97 N. Y. 62; *Hart v. Cleis*, 8 Johns. 41; *Comm. v. Jennings*, 121 Mass. 47; *Hale v. State*, 58 Ohio St. 676; *State v. Abbey*, 29 Vt. 60; *Comm. v. Young*, 21 Penn. Dist. 548.)

HISCOCK, Ch. J. The defendant has been convicted of practicing medicine without a license. The questions which it is necessary for us to consider spring from the form of the indictment which by demurrer and otherwise has been challenged as insufficient.

At all the times in question it was provided by the Public Health Law (Cons. Laws, ch. 45) (§ 161) that "No person shall practice medicine, unless registered and legally authorized * * * or unless licensed by the Regents and registered" as in said section provided. By other sections the violation of this one is made a misdemeanor. Section 160, subdivision 7, of the

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same act provides as follows: "The practice of medicine is defined as follows: A person practices medicine within the meaning of this article, *except as hereinafter stated*, who holds himself out as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition, and who shall either offer or undertake, by any means or method, to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition." Section 173, being the one referred to in the last section, enacts that the article in which such latter section is found "shall not be construed to affect" a large number of specified persons.

The indictment accused the defendant "of the crime of practicing medicine without being registered and legally authorized (as in section 161 required) committed as follows:

"The said * * * Devinny, on May 27, 1918, and for a considerable time immediately prior thereto, at Albany, in this county, unlawfully practiced medicine, he not being then registered and legally authorized" as in the statute required and provided. Under this indictment evidence was given tending to show that the defendant held himself out as being able to diagnose, etc., diseases, and that on three separate occasions he offered and undertook to diagnose and treat the complaint of a certain individual.

Two objections, fundamental in nature, are urged to this indictment. In the first place it is contended that the indictment, in addition to charging in the language of section 161 that Devinny unlawfully practiced medicine without being registered, etc., should have specified under the language of section 160 the specific acts performed by him constituting such unlawful practice, and secondly it is argued that the provision making it unlawful to practice medicine is affected and modified by exceptions and that, therefore, the

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indictment should have negatived these exceptions. These objections will be considered in the inverse order from that in which they have been stated.

The general rule is that in dealing with a statutory crime exceptions must be negatived by the prosecution and provisos utilized as a matter of defense. Attempts to apply this general rule and distinguish between exceptions and provisos have resulted in many technicalities and in much subtlety. The two classes of provisions — exceptions and provisos — frequently come closely together and the rule of differentiation ought to be so applied as to comply with the requirements of common sense and reasonable pleading. In the case at bar if it should be held that an indictment must negative all of the cases referred to in the statute as not being unlawful, it would be drawn out to intolerable lengths and even after that had been done, the burden doubtless would rest upon the defendant of proving that he came within the excepted cases. In addition, section 173, which enumerates the cases where compliance with section 160 will not be required, provides: "This article (which includes section 160) shall not be construed to affect" the cases there enumerated. This language, which should be considered with that of section 160, is quite as appropriate for the statement of a proviso as of an exception.

Under these circumstances we think that the provision in question assumes more the nature of a proviso than of an exception and that the indictment is not defective because it does not negative all of the cases set forth in section 173. (*Fleming v. People*, 27 N. Y. 329; *State v. Flanagan*, 25 R. I. 369.)

The second proposition urged by the defendant that the indictment, aside from the foregoing alleged defect, does not state with sufficient particularity the facts constituting the alleged crime presents more difficulty.

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The rule is applied in many cases that an indictment which charges a statutory crime in the words of the statute is sufficient. (*People v. Ellis*, 162 App. Div. 288; *State v. Collins*, [Ia.] 159 N. W. Rep. 604; *Parks v. State*, 159 Ind. 211; *Benham v. State* 116 Ind. 112; *State v. Flanagan*, 25 R. I. 369.)

It has been held, however, directly or in effect, in several jurisdictions in the cases of indictments or informations similar to the present one that the above rule does not apply and that it is necessary to set forth the details of the alleged offense. (*State v. Carey*, 4 Wash. 424; *Schaeffer v. State*, 113 Wis. 595; *People v. Watson*, [Mich.] 162 N. W. Rep. 943; *Dee v. State*, 68 Miss. 601; *O'Connor v. State*, 46 Neb. 157; *County of Steuben v. Wood*, 24 App. Div. 442.)

Without finding it necessary to determine whether we should go as far as these cases go, we think that it was necessary for the present indictment to set forth one detail of the alleged offense which in this particular case would very likely involve and lead to setting forth generally the details of the offense.

It is abundantly established that in charging an offense committed upon or in respect of an individual—as diagnosing treating or offering to diagnose or treat a disease—it is necessary to name, or excuse naming by proper allegation, such individual. (*People v. Corbalis*, 178 N. Y. 516, concurring opinion of Judge CULLEN; *People v. Stark*, 136 N. Y. 538; *White v. People*, 32 id. 465; *People v. Taylor*, 3 Den. 99; *People v. Gregg*, 59 Hun, 107; *People v. Burns*, 53 Hun, 274; *Grattan v. State*, 71 Ala. 344; *Butler v. State*, [Ind.] 5 Blackford, 280; *Walters v. State*, 174 Ind. 545; *State v. Wilson*, 30 Conn. 500; *Commonwealth v. Sheedy*, 159 Mass. 55.) The reason for the rule is clearly and sufficiently stated in the opinion of Judge CULLEN in the *Corbalis* case. He there said: “I am of opinion that the indictment is fatally defective in failing to allege to whom pools were sold, or,

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if information as to that could not be obtained, that the names of such persons were unknown to the grand jury. This principle was held in *People v. Burns* (53 Hun, 274) and *People v. Stone* (85 Hun, 130), the prosecution being in the first case for selling impure milk and in the second for selling fertilizers with a false certificate. The rule is otherwise as to illegal sales of liquor, but this rule rests merely on precedent long established and can hardly be justified on principle. The idea suggested by some text-writers, that where the offense is merely one against the public and not against the individual, it is not necessary to allege the person with whom it was committed, finds no support in practice. * * * The true reason for requiring the indictment to state the person to whom the sale has been made, if that information can be obtained, is that such statement identifies the occurrence and enables the defendant to properly meet the charge." (p. 523.)

There is an exception to this general rule which is thought to include the present case and excuse naming the person to or upon whom treatment was offered or applied. Where the crime consists of a series of acts continuous in their nature, such as carrying on a prohibited business, or keeping an unlawful resort, a general description reasonably including and describing the series will be sufficient. It is not necessary in such cases to set forth each act going to make up the offense, for, as said in *Commonwealth v. Pray* (13 Pick. 359, 362), "it is not *each* or *all* the acts of themselves, but the practice or habit which produces the principal evil and constitutes the crime." (*Ledbetter v. U. S.*, 170 U. S. 606; *State v. Carlisle*, 30 S. Dak. 475; *Sterne v. State*, 20 Ala. 43; *Lawson v. State*, Id. 65; *Commonwealth v. Swain*, 160 Mass. 354; *Commonwealth v. Coleman*, 184 Mass. 198.)

In our opinion, however, this indictment does not come within that exception. It does not seem to us that the statute was intended to define or constitute the

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prohibited offense as consisting of a continuous series of acts amounting to the conduct of a business within the decisions referred to. It may be that if we had nothing but section 161 prohibiting the "practice" of medicine and were relegated to the dictionary or common usage for a definition of that word we should be compelled to interpret it as meaning a continued and habitual performance of acts. But we are not thus left to these means of reaching a definition. Section 160 defines what "practice" means. Its meaning is satisfied whenever and as often as an individual "holds himself out as being able to * * *" and offers or undertakes to diagnose, treat," etc. Whenever within the fair meaning of those terms on a single occasion an offender has held himself out as able to and has offered to treat a patient there has been a completed offense and it is not necessary to show that this operation has been repeated so many times that it has ripened into a habit or business. We think that the indictment and proofs in this case confirm this view.

If this is the correct interpretation, there is no question that the individual operated upon should have been named or proper excuse given for not naming him even within what has been said in cases applying the "business" rule. (*Ledbetter v. U. S.*, 170 U. S. 610.)

The judgment should be reversed and the indictment dismissed.

COLLIN, HOGAN and ANDREWS, JJ., concur; CHASE, CARDOZO and CRANE, JJ., dissent.

Judgment reversed, etc.

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Statement of case.

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WILLIAM H. SMITH, Respondent, v. THE STATE OF NEW YORK, Appellant.

Court of Claims — jurisdiction — liability of state for tort or negligence of its officers and agents — statute (Code Civ. Pro. § 264) conferring upon Court of Claims jurisdiction to hear and determine private claims against the state does not create any liability against the state not otherwise authorized by statute or maintainable in law or equity.

1. The state is not liable for injuries arising from the negligence of its officers and agents unless such liability has been assumed by constitutional or legislative enactment. Such exemption does not depend upon its immunity from action without its consent, but rests upon grounds of public policy that no obligation arises therefrom.

2. The respondent entered the State Reservation at Niagara by a cinder path, from which he undertook to pass to the grass adjoining, when he tripped and fell over a wire strung on iron posts twelve or eighteen inches high along the edge of the path, and sustained serious injuries, for which he recovered, before the Court of Claims, a judgment for a substantial amount, on the theory that the wire was negligently placed and maintained by the officers and agents of the state. Section 264 of the Code of Civil Procedure confers upon the Court of Claims jurisdiction to hear and determine a private claim against the state. It provides that in no case shall any liability be implied against the state, and no award shall be made on any claim against the state except upon such legal evidence as would establish liability against an individual or corporation in a court or law or equity. *Held*, that the state does not thereby concede its liability in favor of a claimant or create a cause of action in his favor which did not theretofore exist. It merely gives a remedy to enforce a liability and submits itself to the jurisdiction of the court, subject to its right to interpose any lawful defense. Hence, the claimant cannot recover.

Smith v. State, 185 App. Div. 918, reversed.

(Argued December 4, 1919; decided January 6, 1920.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered November 6, 1918, affirming an award of the Court of Claims.

The facts, so far as material, are stated in the opinion.

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Charles D. Newton, Attorney-General (J. L. Cheney of counsel), for appellant. The state is not liable for the torts of its agents and employees. (*Sipple v. State*, 99 N. Y. 284; *Lewis v. State*, 96 N. Y. 71; *Locke v. State*, 140 N. Y. 480; *Splittoff v. State*, 108 N. Y. 66; *Litchfield v. Bond*, 186 N. Y. 66; *Robertson v. Sichel*, 127 U. S. 507; *Riddoch v. State*, 68 Wash. 329; *Murdock Grate Co. v. Commonwealth*, 152 Mass. 28; *Moody v. States Prison of North Carolina*, 128 N. C. 12; *Bourn v. Hart*, 15 L. R. A. 431; *Burroughs v. Commonwealth*, 224 Mass. 28.) The state is not liable because the park was for a governmental purpose, for the benefit of all the people, and not for profit. (*Fire Ins. Co. v. Keesville*, 148 N. Y. 446; *Oaks Mfg. Co. v. N. Y.*, 206 N. Y. 221; *Maximilian v. Mayor, etc.*, 62 N. Y. 160; *Corbett v. St. Vincent's Industrial School*, 177 N. Y. 16; *Hughes v. Monroe*, 147 N. Y. 49; *Clark v. Waltham*, 128 Mass. 567; *Bisbing v. Asbury Park*, 80 N. J. L. 416.) The defense of governmental purpose is not abolished by section 264 of the Code, as held by the Appellate Division. (*Lewis v. State*, 96 N. Y. 71; *Barrett v. State*, 220 N. Y. 423.)

John B. Corcoran for respondent. The state in maintaining the Niagara Reservation as a public park is not performing a governmental function which relieves it from liability for claimant's injuries. (*Gartland v. N. Y. Zoological Society*, 135 App. Div. 163; *O'Rourke v. Mayor, etc.*, 17 App. Div. 349; *Silverman v. City of New York*, 114 N. Y. Supp. 59; *City of Denver v. Spencer*, 34 Col. 270; *Weber v. Harrisburg*, 216 Penn. St. 117; *Burridge v. City of Detroit*, 117 Mich. 557.) The state, by the enactment of section 264 of the Code of Civil Procedure, waived its immunity in claims of this character and consented to have its liability determined the same as a private individual or corporation. (*People ex rel. Swift v. Luce*, 204 N. Y. 478; *People ex rel. Palmer v. Travis*, 223 N. Y. 150; *Sipple v. State*, 99 N. Y. 284; *Burke v. State*, 13 Ct. of

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Claims Rep. 153; *Remington v. State*, 116 App. Div. 522; *Lewis v. State*, 96 N. Y. 71; *Arnold v. State*, 163 App. Div. 253.)

McLAUGHLIN, J. The state of New York, under chapter 336, Laws of 1883, acquired the property known as the State Reservation at Niagara. It is controlled and managed by the state through a board of five commissioners appointed by the governor. The commissioners are required by statute to pay into the state treasury, on the first day of each month, all receipts and earnings received from the management of the reservation and to make an annual report to the legislature giving a detailed statement of all receipts and expenditures for the preceding year. (Public Lands Law [Cons. Laws, ch. 46], secs. 100-106.) The state derives a small revenue from the reservation, *e. g.*, fares paid on the "inclined railway," the little steamer known as the *Maid of the Mist*, and rental from a street railway company which operates a part of its line on the reservation. The purpose of the reservation is declared by statute. (Public Lands Law, sec. 103.) It is "The state reservation at Niagara shall forever be reserved by the state for the purpose of restoring the scenery of Niagara Falls and preserving it in its natural condition, and kept open and free of access to all mankind without fee, charge or expense to any person for entering upon or passing to or over any part thereof."

The claimant, shortly after eleven o'clock at night on April 25, 1915, entered the park by a cinder path, from which he undertook to pass on to the grass adjoining, when he tripped and fell over a wire strung on iron posts twelve or eighteen inches high along the edge of the path, and sustained serious injuries, for which he recovered, before the Court of Claims, a judgment for a substantial amount, on the theory that the wire was negligently placed and maintained by the officers and agents of the

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state. An appeal was taken by the state to the Appellate Division, third department, where the same was affirmed one of the justices dissenting, and it now appeals to this court.

The question presented by the appeal is an important one. It is whether the immunity of the state from liability for the tortious acts of its officers and agents has been waived by section 264 of the Code of Civil Procedure. This section, or so much of it as is material to the determination of the question, reads: "The Court of Claims possesses all of the powers and jurisdiction of the former board of claims. It also has jurisdiction to hear and determine a private claim against the state * * *. In no case shall any liability be implied against the state, and no award shall be made on any claim against the state except upon such legal evidence as would establish liability against an individual or corporation in a court of law or equity."

The rule is well settled that the state is not liable for injuries arising from the negligence of its officers and agents unless such liability has been assumed by constitutional or legislative enactment. (*Locke v. State of N. Y.*, 140 N. Y. 480; *Sipple v. State of N. Y.*, 99 N. Y. 284.) This court, in *Litchfield v. Bond* (186 N. Y. 66, 83), declared the general rule, and in doing so said: "The cases which are sometimes referred to as exceptions to this general rule are not exceptions at all, for they do not fall within the rule. When a state, by express enactment of statutes, assumes responsibility for such torts of its officers and agents as are not affected or controlled by the fundamental law, it makes a new rule for itself. Instances of that kind are to be found in *Sipple v. State of N. Y.* (99 N. Y. 284), where the legislature enacted a statute making the state liable for the negligent operation of its canal locks, upon proof that would create a legal liability against an individual or a private corporation, and in *Woodman v. State of N. Y.* (127 N. Y. 397), where

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negligence in the maintenance of a defective canal bridge was attributed to the state under a similar statute."

The exemption of the state from liability for the torts of its officers and agents does not depend upon its immunity from action without its consent, but rests upon grounds of public policy that no obligation arises therefrom. (*Burroughs v. Commonwealth*, 224 Mass. 28; *Murdock Parlor Grate Co. v. Commonwealth*, 152 Mass. 28; *Riddoch v. State*, 68 Wash. 329; *Davis v. State*, 30 Idaho, 137.)

It is contended by the respondent, and he has been sustained by the Court of Claims and Appellate Division, that the state has assumed this obligation by the enactment of the section of the Code of Civil Procedure to which reference has been made. I am of the opinion the section does not bear such construction. It was not enacted, as it seems to me, for the purpose of extending or enlarging the liability of the state, but solely for the purpose of declaring the jurisdiction of the Court of Claims, before which questions of liability might be tried.

It is true, as urged, that the section confers upon the Court of Claims jurisdiction of the broadest character. The state, under the terms of the section, must be treated as having waived its immunity against actions as to all private claims. (*People ex rel. Swift v. Luce*, 204 N. Y. 478; *People ex rel. Palmer v. Travis*, 223 N. Y. 150.) But it is thoroughly established that by consenting to be sued, the state waives its immunity from action and nothing more. It does not thereby concede its liability in favor of the claimant or create a cause of action in his favor which did not theretofore exist. It merely gives a remedy to enforce a liability and submits itself to the jurisdiction of the court, subject to its right to interpose any lawful defense. (*Roberts v. State of N. Y.*, 160 N. Y. 217.) Immunity from an action is one thing. Immunity from liability for the torts of its officers and

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agents is another. Immunity from such liability may be waived by some positive enactment of the legislature. This, as I read the section of the Code under consideration, the legislature has not yet done.

Statutes in derogation of the sovereignty of a state must be strictly construed and a waiver of immunity from liability must be clearly expressed. (*Litchfield v. Bond, supra.*) There certainly is not in the section an express waiver of the state's immunity from liability for the tortious acts of its officers and agents and the words used will not, in my opinion, permit of such construction. But it is suggested that jurisdiction to hear a private claim for damages, growing out of the negligence of its officers and agents, necessarily implies that the state has waived its immunity for liability therefor. The answer to the suggestion is that the section itself precludes any implication of such waiver in the declaration that "in no case shall any liability be implied against the state." The liability of the state has not been enlarged and it is not true that whenever an individual is liable for a certain act the state is liable for the same act. (*Barrett v. State*, 220 N. Y. 423.) The immunity of the state from liability for the torts of its agents is based, as I have already indicated, upon the broad ground of public policy and it is not waived by a statute conferring jurisdiction only. In the absence of a legislative enactment specifically waiving this immunity, the state cannot be subjected to a liability therefor.

For the foregoing reasons I am of the opinion the judgment of the Appellate Division and determination of the Court of Claims should be reversed and the claim dismissed, with costs in all courts.

HISCOCK, Ch. J., CHASE, COLLIN and ANDREWS, JJ., concur; HOGAN and CRANE, JJ., dissent.

Judgment reversed, etc.

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Statement of case.

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EMANUEL METZGER, as Receiver of the KINGSTON CHEMICAL MANUFACTURING COMPANY, Respondent, v. AEATNA INSURANCE COMPANY, Appellant.

Contracts — rescission — reformation of contract — fire insurance — builder's risk — when builder's risk slip attached to fire insurance policy limits liability to time building is in course of construction.

1. While in equity a rescission of a contract may be adjudged on the ground of a unilateral mistake in its contents, in order that a reformation may be adjudged, there must be mutual mistake or inadvertence or the excusable mistake of one party and fraud of the other. There must have been a meeting of the minds of the contracting parties concerning the agreement, or agreement which the court is asked to declare existent.

2. Ignorance through negligence or inexcusable trustfulness will not relieve a party from his contract obligations. He who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents and to assent to them and there can be no evidence for the jury as to his understanding of its terms.

3. An insurance policy, issued June 9, 1916, insured for the term of one year from that date a factory building in process of erection. Attached to and a part of the policy when delivered was this slip or rider: "Builders Risk Clause. It is understood and agreed that this policy covers the property described herein only while the building is in process of erection and completion and not as an occupied building." Upon the outside of the folded policy, as delivered, appeared the words, "Expires June 9, 1917." The insured's president, at the delivery, said to the defendant's agent, "This policy is written for a year," and received the reply, "Yes." The building was completed in July, 1916. In October, 1916, it had become equipped with machinery. The building was destroyed by fire February 5, 1917. Before that date the agents of the insurer gave notice of cancellation of the policy. In this action brought to recover on the policy the defendant denied liability on the ground it was not an insurer. Held, that the facts do not constitute or disclose a liability on the part of the defendant. The two stipulations in the policy were, obviously, to be read together and said the insurance shall exist for one year unless at a time within the year the erection of the build-

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ing should be completed and its operation entered upon, at which time it shall cease to exist and all the liability under the policy shall cease.

Metzger v. Aetna Ins. Co., 186 App. Div. 627, reversed.

(Argued December 3, 1919; decided January 6, 1920.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered March 14, 1919, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and granting a new trial.

John N. Carlisle for appellant. There is absolutely no evidence upon which to grant reformation of the policy. The complaint was properly dismissed. (*Quinlan v. P. W. Ins. Co.*, 133 N. Y. 356; *Hay v. Star Ins. Co.*, 77 N. Y. 235.) The rule is that a party seeking reformation must prove that there was a mutual mistake by evidence that is clear, positive and convincing. (*Christopher St. Railway Co. v. Twenty-third St. Ry. Co.*, 149 N. Y. 51; *Southard v. Curley*, 134 N. Y. 148; *Reed v. Whitehead*, 1 App. Div. 192; *Salmon v. N. B. & M. Ins. Co.*, 215 N. Y. 214; *Dougherty v. Lion Ins. Co.*, 41 Misc. Rep. 285; 95 App. Div. 618; *Cary Mfg. Co. v. Merchants Ins. Co.*, 42 App. Div. 201; *Kenyon Paper Co. v. Lloyds*, 124 App. Div. 886; *Bryce v. Lorillard Fire Ins. Co.*, 55 N. Y. 240; *Mead v. Westchester F. Ins. Co.*, 64 N. Y. 455; *Thompson v. Phoenix Ins. Co.*, 136 U. S. 287.)

Joseph M. Fowler for respondent. The testimony of the plaintiff raised an actual issue of fact as to whether there was a bilateral mistake of the parties in respect of whether the so-called "builder's risk clause" was a term of the policy limiting the duration thereof. The nonsuit, therefore, was error. (*Kraus v. Birnbaum*, 200 N. Y. 130; *Faber v. City of New York*, 213 N. Y. 411; *Lindenthal v. G. L. Ins. Co.*, 174 N. Y. 76.) The presence of the so-called

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"builder's risk clause" rider upon the policy did not as matter of law limit the duration of the policy to the period during which the insured building was under construction. (*Farwell v. Home Ins. Co.*, 136 Fed. Rep. 93.)

COLLIN, J. The action is to reform a policy of fire insurance, issued by the defendant to the Kingston Chemical Manufacturing Company, and to recover upon the policy as reformed. The trial justice, at the close of the evidence in behalf of the plaintiff, ordered the dismissal of the complaint. The Appellate Division reversed the consequent judgment and granted a new trial.

The direct evidence, and the reasonable inferences from it, most favorable to the plaintiff, would have permitted the jury to find as the facts: The policy, issued June 9, 1916, insured for the term of one year from that date, against fire, in the sum of twenty-five hundred dollars, a factory building in process of erection. Attached to and a part of the policy when delivered was this slip or rider: "Builders Risk Clause. It is understood and agreed that this policy covers the property described herein only while the building is in process of erection and completion and not as an occupied building and that all liability under this policy shall cease when the building shall become occupied in whole or in part; except that if the building is to be a manufacturing plant machinery may be set up and tested." The policy was delivered by the agent of the defendant to the president of the insured, who, at about its date, had told the agent that the building was inclosed and to write a policy for twenty-five hundred dollars at present. Prior to the delivery there were no other negotiations and no agreement between the parties. Upon the outside of the folded policy, as delivered, appeared the words, "Expires June 9, 1917," and the insured's president, at the delivery, said to the defendant's agent, "This policy is written for a year," and received the reply,

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"Yes," and the statement, "he (the agent) had to write it at \$1.25, which is a builders' risk rate, as the building was not identified by the Underwriters, but he would try to get the Underwriters to put a rate on it and he would let me know." He paid the premium of thirty-one dollars and twenty-five cents, and without opening the policy put it in the safe. The building was completed in July, 1916. In October, 1916, it had become equipped with the machinery and the company applied for and received a second policy in the sum of fifteen hundred dollars from a company other than the defendant, represented, however, by the same persons as agents. In October or November, 1916, the agents of defendant told the insured's president that upon the policy of June 9 a premium rate, to take the place of the builders' risk rate, less than five dollars on each one hundred dollars, could not be procured, and wrote him under date of December 16, 1916, as follows: "Enclosed please find endorsements which will be necessary to attach to policies of insurance which we have written for you. You will see that the rate is increased a very large amount, however we assume you will continue the policies until you are able to put in the sprinkler system in your building as it would not pay you to be without insurance. We are protecting your interest and await your further pleasure." The inclosed indorsement pertinent to the policy of June 9 fixed the amount, term and expiration identically with those in the policy and the rate in the additional sum of ninety-three dollars and seventy-five cents, which the insured refused to pay. The agents said they would have to cancel the policy. There ended the transactions between the parties. The insured building was destroyed by fire February 5, 1917. The insured duly served notice and proofs of loss. The defendant denied liability upon the ground it was not an insurer of the building. The insured's president was and had been for many years a lawyer and had had an insurance agency of his

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own after his admission to the bar. He knew the Underwriters Association made the premium rates.

Those facts do not constitute or disclose a liability on the part of the defendant. The policy, in and through the indorsement slip or rider, in form stipulated that it was in force and effect only while the building was in process of erection and completion and the machinery placed and tested, and that all liability under it should cease when the building shall become occupied in whole or in part for operating. The stipulation was in purpose and intendment a potential qualification or limitation of the expressed existence of the insurance through the term of one year. The two stipulations were, obviously, to be read together and said, the insurance shall exist for one year unless at a time within the year the erection of the building should be completed and its operation entered upon, at which time it shall cease to exist and all the liability under the policy shall cease. Expressed conditions within a policy terminating or forfeiting the insurance within the term prescribed in the policy are neither novel nor unusual. The legality of that involved in the instant case is not and cannot be questioned. (Insurance Law [Cons. Laws, chapter 28], section 121.) Its language and meaning are unambiguous, unequivocal and not susceptible of interpretation. There cannot be applied to it the rule that courts are averse to forfeitures and are cautious in enforcing them. If the insured obtained or held a mistaken view or belief concerning the agreements of the policy, the fault or negligence of its president and representative was the cause. A mere reading of the policy would have made him and the plaintiff know the agreements the plaintiff was accepting and entering into. To hold that a contracting party, who, through no deceit or overbearing inducement of the other party, fails to read the contract, may establish and enforce the contract supposed by him, would introduce into the law a dangerous doctrine. Of course,

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the doctrine does not exist. It has often been held that when a party to a written contract accepts it as a contract he is bound by the stipulations and conditions expressed in it whether he reads them or not. Ignorance through negligence or inexcusable trustfulness will not relieve a party from his contract obligations. He who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents and to assent to them and there can be no evidence for the jury as to his understanding of its terms. (*Breese v. United States Tel. Co.*, 48 N. Y. 132; *Hill v. Syracuse, Binghamton & N. Y. R. R. Co.*, 73 N. Y. 351; *Watkins v. Rymill*, 10 Q. B. D. 178; *Moran v. McLarty*, 75 N. Y. 25; *Boylan v. Hot Springs Railroad Co.*, 132 U. S. 146; *Standard Manufacturing Co. v. Slot*, 121 Wis. 14; *Germania Fire Insurance Co. v. Memphis & Charlestown R. R. Co.*, 72 N. Y. 90; *Rice v. Dwight Mfg. Co.*, 2 *Cush.* 80.) This rule is as applicable to insurance contracts as to contracts of any other kind. (*Commonwealth Mutual Fire Ins. Co. v. Knabe & Company Manfg. Co.*, 171 Mass. 265; *Bostwick v. Mutual Life Ins. Co. of New York*, 116 Wis. 392; *Fidelity & Casualty Co. of N. Y. v. Fresno F. & Ir. Co.*, 161 Cal. 466; *Parsons, Rich & Co. v. Lane*, 97 Minn. 98; *Monitor Mutual Fire Ins. Co. v. Buffum*, 115 Mass. 343.) The fact that the acceptor does not sign the contract is, of course, immaterial. (*Quimby v. Boston & Maine R. R. Co.*, 150 Mass. 365; *Vogel v. Pekoc*, 157 Ill. 339.) There are exceptions to the general rule (*Watkins v. Rymill*, 10 Q. B. D. 178; *McMaster v. New York Life Ins. Co.*, 183 U. S. 25; *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235; *Flickinger v. Farmers Mutual Fire & L. Ins. Assn. of Story County, Iowa*, 136 Iowa, 258; *Salom v. Farm Property Mutual Ins. Assn. of Iowa*, 168 Iowa, 521) which do not enter into the instant case. It is manifest that the responsive statement of the defendant's agent at the delivery of the policy that it

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was written for a year could not constitute a fraud or wrongful act or relieve the company from the acceptance of it. Indeed, the plaintiff has not made and does not make a claim of contrary effect. He asserts a mutual mistake in attaching the slip or rider. Conditions forfeiting the insurance are, as we have said, neither novel nor unusual. Illustrations in judicial decisions are many. We refer to *Nelson v. Traders' Ins. Co.* (181 N. Y. 472); *Rosenstein v. Traders' Ins. Co.* (79 App. Div. 481), and *Wilcox v. Continental Ins. Co. of N. Y.* (85 Wis. 193). It is common knowledge and experience that they do not, in ordinary understanding or expression, destroy the prescribed term as that for which the policy is written. With those in the policy, the insured and insurer still say it is written for one year or three years or as the case may be. While in equity a rescission of a contract may be adjudged on the ground of a unilateral mistake in its contents, in order that a reformation may be adjudged, there must be mutual mistake or inadvertence or the excusable mistake of one party and fraud of the other. There must have been a meeting of the minds of the contracting parties concerning the agreement, or agreements, which the court is asked to declare existent. (*Albany City Savings Institution v. Burdick*, 87 N. Y. 40.; *Bidwell & Banta v. Astor Mutual Ins. Co.*, 16 N. Y. 263; *Bryce v. Lorillard Fire Ins. Co.*, 55 N. Y. 240; 21 Halsbury, Laws of England, pp. 16-20.) It is manifest, in virtue of what we have written, there was not a mistake on the part of the insured concerning the terms and conditions of the policy. It is manifest from the evidence there was not a mistake on the part of the insurer. It, by its agent, wrote and delivered the policy. It expressed in it, in language which it could not have misunderstood, the contract it intended and made. The policy as written and delivered must, then, be deemed and taken as the contract of the parties.

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The judgment of the Appellate Division should be reversed and that of the Trial Term affirmed, with costs in the Appellate Division and this court.

HISCOCK, Ch. J., CHASE, HOGAN, McLAUGHLIN, CRANE and ANDREWS, JJ., concur.

Judgment reversed, etc.

CALVIN A. LAMB, Respondent, *v.* S. CHENEY & SON, Appellant.

Contract of employment — malicious interference therewith — when action can be maintained for maliciously inducing plaintiff's employee to break his contract of employment.

1. It is a violation of legal right to interfere with contractual relations recognized by law, if there be no sufficient justification for the interference. Such an act is malicious when the thing is done with the knowledge of the rights of another and with the intent to interfere therewith. In an action to recover damages sustained by reason of a defendant inducing a third party to break his contract, the word "maliciously" should be given a liberal meaning, in which case it does not mean actual malice or ill-will, but consists in the intentional doing of a wrongful act without legal justification.

2. When one man employs a laborer, and another man, knowing of such contract of employment, entices, hires or persuades the laborer to leave the service of the first employer during the time for which he was so employed, the law gives to the party injured a right of action to recover damages.

3. Where a complaint alleges a specific contract between the employee and the employer for a definite time, allegations of defendant's knowledge thereof, that it "maliciously" induced the employee to break his contract and enter the employment of defendant, and by reason thereof damages were sustained, it states a cause of action.

Lamb v. Cheney & Son, 181 App. Div. 960, affirmed.

(Submitted October 2, 1919; decided January 6, 1920.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered February 1, 1918, which affirmed an

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order of Special Term overruling a demurrer to the complaint.

The nature of the action, the facts, so far as material, and the question certified are stated in the opinion.

Louis L. Waters for appellant. The complaint is insufficient because it does not allege the defendant's willful and malicious intent and purpose to injure the plaintiff by depriving him of the employee's services as provided in the contract. (*Posner Co. v. Jackson*, 223 N. Y. 325; *De Jong v. Behrman*, 148 App. Div. 37; *Hasbrouck v. N. P. H. & D. Traction Co.*, 98 App. Div. 563; *Kienlo v. Gretsch Realty Co.*, 133 App. Div. 395; *Turner v. Fulcher*, 165 N. Y. Supp. 282.)

H. W. Coley for respondent. The common-law right of an employer to recover damages against a third person for enticing away his employee is well established. (*Lawler v. Fritcher*, 130 N. Y. 239; *Stewart v. Simpson*, 1 Wend. 378; *Haught v. Badgeley*, 15 Barb. 499; *Covert v. Gray*, 34 How. Pr. 450; *Coughey v. Smith*, 47 N. Y. 244; *Howard v. Washburne*, 3 Den. 369.) The same rule is established in other American states and in England and her provinces. (*Haskins v. Royster*, 70 N. C. 601; *Jester v. Blacker*, 43 Ga. 331; *Bixby v. Dunlap*, 56 N. H. 456; *Lomley v. Gye*, 2 El. & Bl. 216; *Frank & Dugan v. Clemens Herold*, 63 N. J. Eq. 443; *Noice v. Brown*, 39 N. J. L. 569; *Raymond v. Yarrington*, 96 Tex. 443; *Brown Hardware Co. v. Indiana Stove Co.*, 96 Tex. 453; *Bowen v. Hall*, 6 Q. B. Div. 333; *Quinn v. Leathem*, 1901, A. C. 495; *Walker v. Cronin*, 107 Mass. 555; *Carew v. Rutherford*, 106 Mass. 1.)

McLAUGHLIN, J. This action was brought to recover damages alleged to have been sustained by reason of the defendant's inducing a third party to break his contract of employment with the plaintiff. A demurrer to the complaint was overruled, an appeal taken to the Appellate

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Division, third department, where the order was affirmed, two of the justices dissenting, leave then given to appeal to this court, and the following question certified: "Does the complaint state facts sufficient to constitute a cause of action?"

The complaint alleges, in substance, that prior to October, 1915, the plaintiff entered into a contract with one Bullard, by the terms of which the latter, in consideration of the payment to him of certain wages and the occupancy of a dwelling, agreed to work for plaintiff for a period of one year from October 1, 1915; that Bullard moved into the dwelling on October 1, 1915, commenced work and continued to perform his part of the contract until the latter part of June, 1916, when, without plaintiff's consent, he left and vacated the premises; that prior to the time when Bullard terminated his contract and vacated the premises, the plaintiff, ascertaining that defendant was endeavoring to induce him to break his contract and leave the employment of plaintiff, to enter the employment of defendant, notified it in writing that Bullard was in his employ under a contract which did not expire until October 1, 1916; that if defendant persisted in its efforts to and did induce Bullard to leave, plaintiff would hold defendant liable for all damages flowing therefrom; and that after the receipt of this notice, defendant "maliciously enticed, induced and procured" Bullard to leave plaintiff's employ and enter that of defendant. Then follow allegations showing the damages alleged to have been sustained by plaintiff by reason of Bullard's breaking his contract, for which judgment was demanded.

By demurring defendant admits every material allegation of the complaint, and also every fact which can fairly and legitimately be drawn therefrom. Construing the complaint in this way, I am of the opinion that it states a cause of action under the rules established by this court. (*Posner Co. v. Jackson*, 223 N. Y. 325; *Lawyer*

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v. *Fritcher*, 130 N. Y. 239; *Rice v. Manley*, 66 N. Y. 82; *Caughey v. Smith*, 47 N. Y. 244; *Woodward v. Washburn*, 3 Denio, 369; *Benton v. Pratt*, 2 Wend. 385.) It alleges a specific contract for a definite time; defendant's knowledge thereof; that it "maliciously" induced Bullard to break his contract and enter the employment of defendant; and by reason thereof damages were sustained. This states a cause of action not only under the authorities cited, but so far as I have been able to discover, under the rule laid down in the Federal courts, the other states, and in England. Such rule is that if one maliciously interferes with a contract between two parties, and induces one of them to break that contract, to the injury of the other, the party injured can maintain an action against the wrongdoer. (*Angle v. Chicago, St. Paul, M. & O. Ry. Co.*, 151 U. S. 1, 13; *Truax v. Raich*, 239 U. S. 33, 38; *Hitchman C. & C. Co. v. Mitchell*, 245 U. S. 229, 252; *Walker v. Cronin*, 107 Mass. 555, 567; *Berry v. Donovan*, 188 Mass. 353; *McGurk v. Cronenwett*, 199 Mass. 457, 461; *Comellier v. Haverhill Shoe Mfrs. Assn.*, 221 Mass. 554, 559; *Brennan v. United Hatters*, 73 N. J. L. 729; *Kock v. Burgess*, 167 Ia. 727, 733; *Cumberland Glass Mfg. Co. v. De Witt*, 120 Md. 387, 392; *Thacker Coal Co. v. Burke*, 59 W. Va. 253, 255; *Bixby v. Dunlap*, 56 N. H. 456; *Employing Printers' Club v. Dr. Blosser Co.*, 122 Ga. 518; *Quinn v. Leathem*, 1901, A. C. 495, 510; *Lumley v. Gye*, 2 E. & B. 216; *Glamorgan Coal Co. v. South Wales Miners Fed.*, 1903, 2 K. B. 545, 573; *Read v. Friendly Soc.*, 1902, 2 K. B. 732, 739.) This is also the rule laid down by many of the text writers. (Pollock on Torts [10th ed.], p. 343; Anson on Contracts, p. 276; Wood on Master & Servant, secs. 230, 231; Schouler on Domestic Relations, sec. 487; Hammon on Contracts, sec. 350.)

What was said by EVANS, J., in *Employing Printers' Co. v. Dr. Blosser Co.* (*supra*) is quite applicable to the facts set out in the complaint under consideration. He said: "In this state it has been held that when one man

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employs a laborer to work on his farm, and another man knowing of such contract of employment, entices, hires or persuades the laborer to leave the service of the first employer during the time for which he was so employed, the law gives to the party injured a right of action to recover damages."

The word "maliciously" is defined in Bouvier's Law Dictionary (Rawle 3d ed.) as meaning "with deliberate intent to injure." In actions of this character the word should be given a liberal meaning. The act is malicious when the thing done is with the knowledge of plaintiff's rights and with the intent to interfere therewith. In a legal sense it means a wrongful act, done intentionally, without just cause or excuse. (*Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598.) It does not mean actual malice or ill-will, but consists in the intentional doing of a wrongful act without legal justification. (*Cumberland Glass Mfg. Co. v. De Witt, supra*.) The gist of the action is not the intent to injure, but to interfere without justification with plaintiff's contractual rights with knowledge thereof; or, as was very tersely stated by Lord MACNAGHTEN in *Quinn v. Leathem (supra)*, where he said, referring to *Lumley v. Gye (supra)*: "Speaking for myself, I have no hesitation in saying that I think the decision was right, not on the ground of malicious intention,— that was not, I think, the gist of the action,— but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference."

Upon reason and authority, therefore, I am of the opinion that the facts set out in the complaint state a good cause of action. Such facts show an unwarranted interference with the plaintiff's contract with Bullard, and the former, having sustained damage by reason of such interference, can maintain an action therefor.

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The order appealed from, therefore, should be affirmed, with costs, and defendant permitted to withdraw its demurrer and answer, within twenty days, on payment of costs. The question certified is answered in the affirmative.

HISCOCK, Ch. J., CHASE, CARDOZO, POUND and ANDREWS, JJ., concur; HOGAN, J., not voting.

Order affirmed.

CHARLES S. WILSON, as Commissioner of Agriculture of the State of New York, Respondent, *v.* JOSEPH ISRAEL, Defendant, GLOBE INDEMNITY COMPANY, Appellant, and COLD SPRING CO-OPERATIVE CREAMERY ASSOCIATION OF ROXBURY, NEW YORK, Respondent.

Agricultural Law — construction and application of section 55 — a creamery association organized under the Business Corporations Law not a "producer" within meaning of statute.

A creamery association organized under the Business Corporations Law (Cons. Laws, ch. 4), the largest part of the business of which consists of buying milk and cream for sale, is not a "producer" of milk or cream within the meaning of section 55 of the Agricultural Law (Cons. Laws, ch. 1). Hence the commissioner of agriculture was not authorized to take and enforce for the benefit of such an association the bond which is required by section 55 of that act, having the condition that a licensee thereunder to sell milk or cream shall pay all amounts due to those who have sold milk or cream to him. The language means "producers" who have sold to the licensee, and those only.

Wilson v. Israel, 185 App. Div. 816, reversed.

(Argued October 13, 1919; decided January 6, 1920.)

APPEAL from a judgment, entered January 28, 1919, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term without a jury and directing judgment in favor of plaintiff.

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The nature of the action and the facts, so far as material, are stated in the opinion.

James A. Foley and *Robert M. McCormick* for appellant. The Cold Spring Co-operative Creamery Association is a business corporation engaged in the buying and selling of milk and is not a producer of milk within section 55 of the Agricultural Law and the bond of the Globe Indemnity Company does not cover its claim against Joseph Israel, the licensee. (*Monroe Dairy Assn. v. Webb*, 40 App. Div. 49; *Matter of White*, 118 App. Div. 869; *Matter of Watson*, 171 N. Y. 256; *Matter of Moses*, 135 App. Div. 525; *Matter of De Peyster*, 210 N. Y. 216; *Matter of Rockefeller*, 177 App. Div. 786; *People ex rel. W. & H. St. R. Co. v. Miller*, 181 N. Y. 328.)

Charles D. Newton, Attorney-General (*Robert P. Beyer* of counsel), for plaintiff, respondent. The Cold Spring Co-operative Creamery Association of Roxbury, N. Y., is a producer of milk as said term is implied in section 55 of the Agricultural Law. (*Tonnele v. Hall*, 4 N. Y. 140; *People v. Essex County Supervisors*, 70 N. Y. 228; *People v. Lacombe*, 199 N. Y. 43; *Jewell v. City of Ithaca*, 72 App. Div. 220; *Glason v. Rothschild*, 220 Mo. 186; *People ex rel. Braburn Association v. Hankins*, 154 App. Div. 679; 207 N. Y. 761; *People ex rel. Urban Water Supply Co. v. Connelly*, 164 App. Div. 163; *Pardy v. Boomhower Grocery Co.*, 176 App. Div. 347; *People v. Beakes Dairy Co.*, 222 N. Y. 416; *Huson v. Brown*, 9 Misc. Rep. 175; *Monroe Dairy Assn. v. Webb*, 40 App. Div. 49.) The terms of the bond require payment of all amounts due for the sale of milk and cream to the licensee during the period covered by the license. (*Matter of Adler*, 76 App. Div. 571; 174 N. Y. 287; *Quigley v. Thatcher*, 144 App. Div. 710; 207 N. Y. 66.)

Charles R. O'Connor for defendant, respondent. The defendant Cold Spring Co-operative Creamery Associ-

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ation of Roxbury, N. Y., is a producer of milk within the meaning of the statute. (*People v. Beakes Dairy Co.*, 179 App. Div. 942.) The condition of the bond in suit entitles the plaintiff to recover even though the defendant creditor be not a producer. (*People v. Lacombe*, 99 N. Y. 43.)

Hiscock, Ch. J. This action is brought by the plaintiff in his official capacity to recover for the benefit of the respondent Cold Spring Co-operative Creamery Association on a bond given by the appellant corporation conditioned for the payment by one Israel of amounts due to the Creamery Association for milk and cream purchased from it. The bond was executed under the assumed authorization of section 55 of the Agricultural Law (Cons. Laws, ch. 1) which permits such a bond to be taken for the benefit of "producers" of milk and cream and the determinative question to be considered is the one whether the Creamery Association was a "producer" of milk within the meaning of that section.

This association, so called, was a corporation organized under the Business Corporations Law (Cons. Laws, ch. 4) with a capital stock of \$4,000 and all of which, with the exception of a one-half share, was held by its patrons. By its articles of incorporation it was organized for the purpose of owning and operating a creamery and for the purpose of "purchasing, manufacturing, selling, and dealing in milk, cream, butter, cheese, and other dairy products." It did some manufacturing of cheese, but apparently the largest portion of its business consisted in buying milk and cream which it marketed in New York city. About ninety per cent of the persons from whom it took milk and cream were its stockholders. It paid these respectively each month in cash for the deliveries of the preceding month and it collected the proceeds of the milk and cream which it sold. After deducting the expense of running the business and losses, and reserving the necessary

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amount with which to pay a dividend of six per cent upon its capital stock, it then distributed the balance of its receipts on a fixed basis amongst those from whom it had purchased. It kept no cows and received and had no milk except through the methods above mentioned.

Amongst the persons to whom it sold milk and cream was one named Israel and in his behalf there was executed by the appellant corporation the bond upon which this action is based. That bond, as has been stated, was exacted and taken by the commissioner of agriculture under the assumed authority of section 55, and upon the provisions of that section must rest the right to take and enforce it for the benefit of the Creamery Association in this action. We turn to these provisions to search for the authority.

Omitting many provisions which are inconsequential here we find the following ones which are material: "No person * * * shall buy milk or cream within the state from *producers* for the purpose of shipping the same to any city for consumption * * * unless such person * * * be duly licensed." Provision is then made for setting forth in the application to be filed for a license various particulars and the conditions are prescribed under which a license may be issued. Amongst others is the one "A license shall not be issued as provided in this section * * * unless the applicant for such license shall file with the application a good and sufficient surety bond, * * * in a sum not less than five thousand dollars * * *. The bond required to be filed hereunder shall be given to the commissioner of agriculture in his official capacity and shall be conditioned * * * for the payment of all amounts due to persons who have sold milk or cream to such licensee, during the period that the license is in force." From these provisions it will be seen that the statute is enacted for the protection of "producers;" that no one is permitted to buy milk or cream from them without securing a license,

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and that no license can be issued — with exceptions not material here — unless a bond shall have been executed for the payments of all amounts due to persons who have sold milk or cream.

On these facts and under this statute we do not think that it can be held that the Creamery Association was a "producer" of milk or cream and, therefore, the commissioner of agriculture was not authorized to take for its benefit and now enforce the undertaking in question. It is true, as suggested at the Appellate Division, that the bond is conditioned, amongst other things, for the payment of all amounts due to persons who have "sold" milk or cream to the licensee, and these words literally interpreted would include the Creamery Association. We believe, however, that these words must be construed in connection with and limited by the purpose of the section and the language used elsewhere. A few words cannot be detached from all the rest of the section for purposes of construction. The persons who are to be protected by the bond executed under the section are producers. A person is not permitted to buy from that class without executing this bond, and when the condition of the bond in accordance with the language of the statute is that the licensee shall pay all amounts due to those who have sold to him, we think that the language clearly means producers who have sold to him and who are the only ones intended to be safeguarded by the statute.

As we thus come to the ultimate question of the meaning of the word "producer" we are not unmindful that a liberal construction should be given to the statute for the purpose of securing protection to those who were contemplated by the legislative mind, and we may even assume for the purposes of this discussion that this corporation was organized for the general purposes of facilitating the marketing of milk and cream by those who were the producers and that to that extent and in that way it was their agency. Nevertheless we do not

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see how we could hold that it was a producer within the meaning of the statute without utterly disregarding conditions and circumstances which are more than mere forms. Clearly the corporation was not a producer of milk in any ordinary sense. It did not keep cows and draw from them the milk as is done by one who in the real sense produces milk. But beyond this, unless we are absolutely to disregard corporate organization and purposes, this corporation was an institution entirely separated and distinct from those who did produce the milk. It was organized as a corporation under the Business Corporations Law. It was not a voluntary association or organized under the Membership Corporations Law (Cons. Laws, ch. 35). It was organized for several purposes in addition to the one here involved. It took complete title to the milk and cream which was brought to it, had absolute control and ownership of it, and sold to whomsoever its officials desired and collected the pay therefor. It is true that it distributed certain profits amongst those from whom it had purchased milk or cream, but that does not at all alter the fact that it had acquired as against all real producers complete title and control over the product which they had sold and transferred to it. The course of dealing between the association and those who owned the cows and drew the milk, whatever the ultimate purpose, completely detached the title to, ownership and control of the milk from the producer and transferred them to a marketing corporation, and in our judgment there is too distinct and too wide a line of separation between the people who owned the cows and the corporation which took the milk to be overlooked even under the latitude allowed in construing a remedial statute.

If it were necessary we think that the correctness of these views would be materially supported by a certain change which was made in this statute. Originally it provided for the issuance of licenses entitling the licensee to conduct the business of buying milk from "dairymen."

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The attorney-general soon rendered an opinion to the effect that the word "dairymen" included any person who sold milk, and that, therefore, all purchasers of milk within the state of New York were required to be licensed. The statute then was changed so as to substitute "producers" for "dairymen" and thereby it seems to be made quite plain that the legislature clearly distinguished between those who produced and those who sold milk, and intended to limit its protection to the former.

We think that the judgment of the Appellate Division should be reversed and that of the Trial Term affirmed, with costs in this court and in the Appellate Division, CHASE, COLLIN, POUND and ANDREWS, JJ., concur; CARDODOZ and CRANE, JJ., dissent.

Judgment reversed, etc.

SARATOGA STATE WATERS CORPORATION, Appellant, v.
GEORGE D. PRATT, Respondent.

Contracts by state — constitutional law — validity of agreement between commissioners of State Reservation at Saratoga Springs giving plaintiff the right to use and possess certain property of the state for specified purposes — refusal of conservation commissioner to carry out such agreement — when plaintiff entitled to injunctive relief from acts of commissioner — personal liability of commissioner as wrongdoer — unconstitutionality of chapter 204 of Laws of 1917 attempting to confirm acts of commissioner.

1. In the absence of constitutional restrictions the control by the state of its proprietary estates and institutions is plenary and its agreements, unaffected by deceit, corruption, collusion or illegal unfairness, as the agreements at the bar are, are not justiciable.

2. The agreement entered into between the commissioners of the State Reservation at Saratoga Springs with the Saratoga State Waters Corporation by authority of chapter 569 of the Laws of 1909, as amended by chapter 394 of the Laws of 1911, was duly executed by the contracting parties. There was not in the making of it any deceit, corruption or unfairness, and it was within the statutory authority of

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the commissioners. None of its provisions inherently infracts the statutes or transcends the statutory authorization to the commissioners, with this exception: The provision that any difference arising between the parties during the operation of the instrument shall be submitted for final and conclusive adjudication to arbitrators is, perhaps, unenforceable. This covenant is not so interwoven with the other agreements of the instrument as to affect its integrity and validity. Hence, the plaintiff is entitled to the possession of the property mentioned in the instrument and the possession of the defendant, the conservation commissioner, who has taken possession of it and excluded plaintiffs therefrom, is wrongful and without legal right.

3. The instrument granted to the plaintiff complete and perfect rights of use and possession as described in it. It was operative and effective as a grant and vested in the plaintiff an unconditional interest or estate in the land. It was an agreement on the part of the state that the plaintiff should have and retain the real property — an incorporeal hereditament. The rights granted the plaintiff were not revocable by and at the will of the state or its representatives. The state, or the legislature, of course, could not repeal or abrogate the grant of real property made by it.

4. The action in equity for injunctive relief from the possession or an interference by the defendant is the proper remedy. An injunction is the usual remedy invoked by the owner of a legal easement to remove an obstacle to its possession and enjoyment. The fact that there is neither privity of estate nor privity of contract between the owner and the aggressor is immaterial.

5. The acts of the defendant in preventing, by his anterior use and possession, the plaintiff entering into the rights and privileges granted it by the instrument were unauthorized and unlawful and constituted the defendant an individual wrongdoer. In them the defendant ceased to be a public officer and became a private wrongdoer and chapter 204 of the Laws of 1917, in so far as it purported or was intended to adopt or confirm those acts, or violate the grant of the state to the plaintiff, destroyed property rights protected by the Constitution and was ineffective and immaterial.

Saratoga State Waters Corporation v. Pratt, 184 App. Div. 561, reversed.

(Argued October 15, 1919; decided January 6, 1920.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered October 5, 1918, reversing a judgment in favor of plaintiff

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entered upon a decision of the court on trial at Special Term and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Henry W. Williams and *Edgar T. Brackett* for appellant. The fairness of the lease is not in issue. There is no evidence to show unfairness. The former commissioners were sole judges of the terms and their action cannot be reviewed. (*People v. Stephens*, 71 N. Y. 527; *People ex rel. Graves v. Sohmer*, 207 N. Y. 450.) The fact that Mr. Pratt happens to be a state officer does not prevent his being sued if, as such officer, he acts illegally or beyond his official power as such state officer. As to such excess he ceases to represent the state and his official position is no justification and he may be sued as an individual, and such suit is not against the state. (*Litchfield v. Bond*, 186 N. Y. 66; *United States v. Lee*, 106 U. S. 196; *Saranac Land & Timber Co. v. Roberts*, 195 N. Y. 303; *Sanders v. Saxton*, 182 N. Y. 477; 33 Misc. Rep. 389; *Wright v. Shanahan*, 149 N. Y. 495; *Trani v. Gerard*, 181 App. Div. 387; *Flood v. Van Wormer*, 147 N. Y. 284; *Abell v. Van Gelder*, 36 N. Y. 513; *Danihee v. Hyatt*, 151 N. Y. 493; *Finnegan v. Carragher*, 47 N. Y. 493; *Clasan v. Baldwin*, 129 N. Y. 183; *Hennessey v. Paulsen*, 147 N. Y. 255.) Chapter 204 of the Laws of 1917 cannot be considered with reference to this case. If it could, it does not have the effect claimed. If it did, then the statute would be unconstitutional. For these reasons the Appellate Division erred in denying the plaintiff relief. (*Litchfield v. Bond*, 186 N. Y. 66; *Cogswell v. N. Y., N. H. & H. R. R. Co.*, 103 N. Y. 10; *Johnston v. Spicer*, 107 N. Y. 185; *Matter of Mayor, etc.*, 99 N. Y. 569; *Donald v. State*, 89 N. Y. 36; *Salas v. United States*, 234 Fed. Rep. 842; *Bailey v. Mayor*, 3 Hill, 521, 539; *Republic of France v. Vichy Co.*, 191 U. S. 437; *People ex rel. Vil. of South Glens Falls v. P. S. Comm.*, 225 N. Y. 216; *People v. Roper*, 35 N. Y.

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Points of counsel.

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629; *People ex rel. Iroquois Door Co. v. Knapp*, 186 App. Div. 172.) The instrument in question is a lease or concession. It describes and conveys an estate in land or an incorporeal hereditament. As to these it is executed, not executory. The executory covenant is as to collateral matters not affecting possessory rights. (*Harris v. Harris*, 75 App. Div. 216; *Coleman v. M. B. Improvement Co.*, 94 N. Y. 229; *Moore v. Brown*, 139 N. Y. 127.)

Adelbert F. Jenks for respondent. The contract, the validity of which is involved in this action, is not a "lease or concession," within the meaning of the statute; nor was it made for proper rentals or upon other proper terms; many of its provisions are in violation of the statute authorizing the board to grant leases or concessions, and the same is, therefore, unauthorized and void. (*Syracuse Water Co. v. City of Syracuse*, 116 N. Y. 167; *Parpitt v. Furguson*, 159 N. Y. 111; *Gale v. Vil. of Kalamazoo*, 24 Mich. 344; *Milhau v. Sharp*, 27 N. Y. 611; *Smith v. Cornelius*, 30 L. R. A. 747; *Haggart v. Morgan*, 5 N. Y. 422; *National Construction Co. v. H. R. W. P. Co.*, 179 N. Y. 439; *National Contract Co. v. Hudson River Water Co.*, 192 N. Y. 220; *Bell v. Leggett*, 3 Seld. 176; *Dugan v. Anderson*, 36 Md. 507; *Johnson v. Trask*, 116 N. Y. 136.) The statute, while using the words "may grant leases or concessions for the use of any portion of the said land, water or gases," does not contemplate a grant of any vested interest or estate therein; but simply a privilege to enter upon the reservation lands and to bottle and sell the water. (*Smith v. Cornelius*, 35 L. R. A. 747; *Jones v. Kansas City*, 178 Mo. 528; *Moore v. Brown*, 139 N. Y. 127; *Roberts v. Lynn Ice Co.*, 73 N. E. Rep. 523; *Huntington v. Asher*, 96 N. Y. 604.) This action is, in substance, clearly against the state and cannot be maintained. (*Sanders v. Saxton*, 182 N. Y. 477.) It is elementary in the law of contracts that where the covenants to be

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performed are wholly executory, either party may refuse to perform and thereby breach the contract, in which event the party not in default has a just claim for damages. (*Parr v. Village of Greenbush*, 112 N. Y. 260; *People v. Stephens*, 71 N. Y. 527.) The legal effect of chapter 204 of the Laws of 1917, which created a capital fund for the use of the Saratoga Reservation and directed the conservation commission to bottle and market the surplus waters of said reservation was not to impair the obligation of the contract, but rather to ratify the action of the conservation commissioner in refusing to perform it. (*Danolds v. State*, 89 N. Y. 36; *Lord v. Thomas*, 64 N. Y. 127; *Cook v. Gray*, 2 Houst. 455; *Caldwell v. Donaghey*, 45 L. R. A., N. S., 721.)

COLLIN, J. The plaintiff, a domestic corporation, seeks the judgment that it is entitled to the possession of the property described in the complaint, that the defendant deliver to it and be enjoined from interfering with it in taking the possession, and that it recover the damages sustained by reason of its exclusion from the property. The Special Term, by its decision on trial, granted the judgment. The Appellate Division reversed the judgment in a non-unanimous decision and granted a new trial. The plaintiff, stipulating that judgment absolute be rendered against it in case we affirm the judgment of reversal, presents the appeal.

The property involved is within or connected with the State Reservation at Saratoga Springs. The State Reservation consists of lands containing mineral springs, buildings and machinery, and personal property used in the bottling and marketing, or the use and disposition of the waters of the springs. The state acquired it in virtue of and pursuant to chapter 569, Laws of 1909, and the amending act, chapter 394, Laws of 1911. The statute created a board designated "The Commissioners of the

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State Reservation at Saratoga Springs," to consist of three persons, and empowered the commissioners to acquire the property. Section 5 of the act of 1909, relating to the general powers of the board of commissioners, had the provision: "Said board * * * may grant concessions and leases of any portion of the same upon terms to be fixed by it, * *. *." In 1911 (Laws of 1911, chapter 394) the act was amended and given the form it had when the instrument, hereafter to be described, was executed. It provided in section 2 that no part of the reservation property "shall be sold or aliened without the consent of the legislature, except by concession granted and limited as hereinafter provided." In section 4 it provided that the reservation properties should be maintained and used for the purpose, among others, of promoting the resort to the springs of the people of the state for health, and the other suitable use of the reservation by the people and of providing the waters to the people for drinking free of charge. Section 5 provided: "Said board shall have the care, custody and control of said reservation, and of all the mineral springs, wells, mineral water and natural carbonic acid gas thereon, therein, or thereunder, and of all the rights, easements, and interests acquired by it. The said board shall make reasonable provision for the free drinking of said waters at points as near as shall be convenient to the respective sites of the springs producing said waters; it may prescribe and publish and enforce all proper regulations for the maintenance and care and protection of said properties, and for the distribution and proper use of said springs, wells, waters and gases and for the other maintenance, care and protection of said reservation. The board may, for proper rentals or other payment and upon any other proper terms, grant leases or concessions for the use of any portion of the said land, waters or gases; but every such lease, concession or use shall by its terms be subject to reasonable provision for the free drinking of such waters

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and shall provide that the use by the lessee, concessionee or concessionees of any property or right included in the state reservation shall be at all times subject to the reasonable regulations of the board, and that all uses of the waters, gases, lands or interests by the lessee, concessionee or concessionees shall be subject at any time to the free inspection of the board and its representatives. The board may prescribe the terms upon which any excess of mineral water and gas not used on said reservation, or used under such concessions, shall be sold or distributed and shall prescribe the names, labels and advertisements to be affixed to the bottles or other vessels containing such waters or gases or to be published; and the said board may itself sell or dispose of such excess of water. * * * All sums received by said commission shall be paid into the state treasury, and all the expenses of said commission shall be paid upon the warrant of the comptroller; it shall report in writing each year to the legislature, specifying, in detail, its receipts and expenditures for such year." The statute constituted the commissioners a body corporate for the purposes of adopting any mark or device they would use in connection with the sale and use of any of the mineral waters and to take prescribed means to secure the exclusive right to the use of the name or device under the statutes of any state or country where the sale of such waters may be carried on, of prosecuting violators of any law for the regulation of the sale of mineral waters and to have all other powers conferred upon corporations in this state by the General Corporation Law and which are not inconsistent with the provisions of the act. (Laws of 1911, chapter 394, section 5.) The right of the legislature to give the powers conferred by the statute is not and cannot be questioned.

The basis of the action is an instrument in writing executed "between the State of New York, acting by the Board of Commissioners of the State Reservation at Saratoga Springs, party of the first part," and four

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individuals, parties of the second part. The plaintiff, Saratoga State Waters Corporation, is the successor and, in all respects, takes the place of the four individuals and will be treated in this opinion as having been the original party of the second part. The instrument bears date March 6, 1916, and is voluminous, comprehensive and detailed. Deferring for future statement, as the discussion necessitates, particular parts, the general effect of its provisions are: By virtue of the statutes the parties make the agreements; in consideration of the rents, covenants and stipulations mentioned the state "doth demise and lease" unto the plaintiff designated mineral spring properties, subject to the right of the state to take for its bathing business the surplus waters from any and all of the springs not used by the plaintiff for drinking or bottling; the right to bottle and sell under the terms of the lease such surplus waters of any other spring, the water of which the commissioners may decide to place upon the market during the leased term; described buildings, machinery and equipment; the use of roads and paths and the lands required for the erection of additional structures necessary for the proper prosecution of the business contemplated by the contract, and which may not be needed for state reservation purposes; the plaintiff shall market to its best endeavors the surplus waters of the springs at the prices existing or thereafter mutually agreed upon, and maintain all necessary arrangements, appliances and services to enable the public at all reasonable times to drink the waters at their sources, without charge, at the existing facilities and at the other places thereafter agreed upon by the parties, and shall expend each year not less than five per cent of the gross receipts for the preceding year for advertising purposes; shall arrange forthwith for an efficient and economical distribution of waters in the city of New York, and for prompt distribution of waters to patrons from warehouses in the principal cities in the United States and elsewhere,

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whenever and wherever the business under the lease shall warrant; shall carefully keep accounts of the entire business which shall be open at all times to the inspection of the commissioners; shall operate in the most economical manner possible, consistent with efficient conduct of the business; shall within thirty days of December 1 of each year render to the commissioners a statement of the net profits for the year and pay over to the commissioners the agreed upon amount, then unpaid, as and for the rental under the lease; shall pay to the state as and for the rent of the demised premises annually, in quarter payments, prescribed royalties and percentages. The agreement provides the manner of closing up the business and settling the matters between the parties at the termination of the term. The plaintiff shall make such ordinary repairs to all machinery, fixtures and appliances as are necessary to keep the same in as good working condition as when received from the state. The use by the company of any property or right shall be at all times subject to the reasonable regulations of the commissioners and the valid municipal ordinances of the city of Saratoga Springs, and the inspection at all times of any part of the property by the commissioners. The state shall take proper measures to keep the springs and fixtures connected with them in good order and give reasonable attention and care towards maintaining the flow and character of the waters; shall keep buildings, machinery and fixtures insured for not less than seventy-five per centum of their actual value, the avails of which in case of damage by fire shall be applied in repairing or restoration; shall make all replacements and improvements to the buildings, grounds and piping (but not ordinary current repairs) necessary to maintain their present efficiency; shall at frequent intervals cause such tests, accessible to the company, to be made by the chemist in charge of its laboratory as may be requisite to insure confidence in the purity and mineralization of the waters sold. It contained

the provisions: "And it is further understood and agreed by and between the parties that this contract is made subject to the provisions of any and all statutes heretofore enacted by the Legislature of the State of New York relating to the management and government of the Reservation and the mineral water thereon; and all such enactments enter into and become a part of this contract with like effect as if specifically set forth herein. * * * And it is further covenanted, agreed and understood by and between the parties to this agreement that the same shall be valid and effectual only so far as the Commissioners of the State Reservation at Saratoga Springs are lawfully empowered to enter into the same; and, in case it shall be held that in respect to any covenant, agreement, condition or provision contained in this instrument, the said Commissioners have exceeded their lawful powers, they shall in no event be held liable to the parties of the second part for or on account of any such covenant, agreement, condition or provision, but the same shall be void and of no effect; and that as to any and every covenant, agreement, provision and condition which involves the expenditure of moneys by the party of the first part, it shall be valid and operative only in case of an appropriation by the Legislature of the State of New York adequate for the particular purpose and properly applicable thereto and to the extent of such appropriation only. But in case said Commissioners should be without funds appropriated for any expense to be incurred for the carrying out of any improvements, repairs or other acts or things to be done by the State under the provisions of this agreement, then and in such case the same may be made, done or performed by the parties of the second part and charged against the rents due and accrued or thereafter to accrue or become due under and in pursuance of the provisions of this agreement." The estate or interest created should begin April 25, 1916, and continue until May 1, 1921, with

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four renewal privileges (the provisions having been fulfilled) to the plaintiff of five years each — the entire period not to exceed twenty-five years from May 1, 1916.

The plaintiff was organized and officered pursuant to requirements of the instrument with a paid cash capital of thirty-five thousand dollars and has duly performed all the terms and conditions of the instrument in so far as it has been permitted to. It has been interfered with as follows: On April 19, 1916, the legislature transferred the powers of the commissioners of the state reservation at Saratoga Springs to the conservation commission. (Laws of 1916, chapter 257, section 1.) The defendant was on that date and at all times since has been the conservation commission. The plaintiff endeavored to take possession, pursuant to the stipulations in the instrument, of the property subject to the instrument, and the defendant at all times since and including April 25, 1916, has wholly prevented it from taking possession of or exercising any rights over the property and from performing the terms of the instrument. The defendant is, and at all times since and including April 25, 1916, has been, in, and withdraws from the plaintiff, the possession.

The instrument was duly executed by the contracting parties. There was not in the making of it any deceit, corruption or unfairness. The elaborate contents manifest deliberation, thoughtfulness and caution in designing the substance and form of it.

The instrument in its general nature and intendment is within the statutory authority to the commissioners. The statutes disclose that the state as the proprietor of the springs and property producing mineral and salable waters intended to enter the markets for those waters, through the direct action of the commissioners or under arrangements made by them. The statutes authorized the distribution and sale beyond the confines of the reservation of the waters not required or used

within it. The general scheme of the instrument of March 6, 1916, was to obligate the plaintiff to bottle, at the reservation, waters, not required for drinking there or for bathing purposes, to sell them, at the fixed prices, as abundantly and broadly as reasonable diligence and the best skill and ability of the plaintiff could effect and pay the state the stipulated royalties and compensation. The scheme was clearly within the statutory intendment. The provision of the statute, "And no part of the property acquired for such purpose (the reservation) shall be sold or aliened without the consent of the legislature, except by concession granted and limited as hereinafter provided," did not relate to or interdict it. The commissioners might lawfully grant to the plaintiff the rights, privileges and property necessary or reasonably accessory to the fulfillment of it.

The defendant seeks to nullify the instrument upon the ground that terms and stipulations on the part of the state were improper and not authorized. He states and urges specifications in support of the ground. A discussion of each will not be useful. Certain of them are refuted by the general declarations we have made. Others do not possess merit. Others were purely business propositions to be considered and discussed between the parties to the instrument and determined by them. The state, of course, has the right and the power to enter into obligations. In the absence of constitutional restrictions its control of its proprietary estates and institutions is plenary and its agreements, unaffected by deceit, corruption, collusion or illegal unfairness, as the agreements at the bar are, are not justiciable. A scrutiny and consideration of each specification of defendant's counsel leads to the conclusion that not one inherently infracts the statutes or transcends the statutory authorization to the commissioners, with this exception: The provision that any difference arising between the parties during the operation of the instrument shall be sub-

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mitted for final and conclusive adjudication to arbitrators is, perhaps, unenforceable. Parties cannot undertake by an independent covenant of a contract to provide for an adjustment of differences arising in its performance by arbitration, to the exclusion of the courts. (*President, etc., D. & H. C. Co. v. Pennsylvania Coal Co.*, 50 N. Y. 250.) This covenant, manifestly, is not so interwoven with the other agreements of the instrument as to affect its integrity and validity. (*Central N. Y. Tel. & Tel. Co. v. Averill*, 199 N. Y. 128, 140.) The evidence supports the findings of the trial court that the plaintiff is entitled to the possession of the property mentioned in the instrument and that the possession of the defendant is wrongful and without legal right. It may be that in the operation and complete performance of the agreements illegal unfairness or results will develop. The effect of the clauses we have quoted, in form, preventing in such event the nullification of the entire instrument, may then come in question. Those clauses certainly do not, as claimed by the defendant, inoculate the entire instrument with illegality.

We deem it unnecessary to enter into a determination as to the exact meaning of each of the terms "lease," "concession," "lessee" and "concessionee" in the legislative mind in enacting the statute. It was a clear legislative intention to confer upon the commissioners, as the agents or representatives of the state, the full control of the entire property constituting the reservation, within the purposes of restoring, maintaining and developing the supply of water and its widespread distribution to and use by the public. The limitations of the control, generally speaking, were inability (a) to lessen or destroy the reservation by selling any land or interest acquired under section 2 of the statute, and (b) to interfere with or lessen the right of the people to free access, under reasonable regulations, to the reservation and the free drinking upon it of the waters. It was a clear legislative intention

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to empower the commissioners, subject to the statutory limitations, to let outside or third parties have the rights or privileges of using for the purposes contemplated by and within the intendment any part of the land, waters or gases. The using of the terms referred to, or either of them, does not fix and dominate the legislative intendment.

A claim of the defendant is that the instrument is an ordinary contract of employment of the plaintiff, with compensation to it, to carry on for the state the bottling and sale of the waters with license to enter for the purposes of the contract, and that the state may refuse to proceed under the contract and such refusal would automatically revoke the license; the state would then be liable for breach of contract to be prosecuted in the Court of Claims; but it would still be able to control the possession of its property, either by direct action of the legislature, or indirectly through the powers delegated to its authorized agent, the conservation commissioner. The claim is ill-founded. The rights granted the plaintiff were not revocable by and at the will of the state or its representatives. Those rights invested the plaintiff with an interest of some character in the lands of the reservation. This much is manifest. A license is revocable and carries no interest in the land in or over which it is to be enjoyed. It may become irrevocable through the expenditure of money by the licensee and, when executed, will prevent the owner of the land from maintaining an action of trespass for the acts done under it. The rights of the plaintiff here were not temporary, were not revocable and were not devoid of an interest in the land. In virtue of them the plaintiff not only was authorized, but was obligated, to appropriate and take away and sell the waters, to go upon, possess and use the lands as prescribed and to use and maintain and, if required, erect upon the land buildings and structures, throughout the fixed period. The right of taking profits in another's land is commonly called *profits a prendre*. It is in the nature

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of an easement in the land; it is, however, something more. One of the distinguishing features of a pure easement is the absence of all right to participate in the profits of the soil charged with it; the existence of a privilege without profit. (*Wolfe v. Frost*, 4 Sandf. Ch. 72, 77; *Greenwood Lake & Port J. R. R. Co. v. New York & Greenwood L. R. R. Co.*, 134 N. Y. 435.) The distinguishing feature of *profit a prendre* is the right to appropriate and take from the land charged with it a part of the soil or product of it, in which there is supposable value. (*Pierce v. Keator*, 70 N. Y. 419.) Each right requires the use of the land in which it exists, and to use is to possess. Each, therefore, involves possession, though the title and broader right of possession is in another. Each implies such estate in the land as may be necessary to the enjoyment of the right. Each is incorporeal real property. Incorporeal real property is defined to be a right issuing out of or annexed to a thing corporeal, and consists of the right to have some part only of the produce or benefit of the corporeal property, or to exercise a right or have an easement or privilege or advantage over or out of it. (*Nellis v. Munson*, 108 N. Y. 453; *Long Island R. R. Co. v. Garvey*, 159 N. Y. 334.) Each may be and commonly is attached to or exists for the benefit of land (known as the dominant tenement) other than that charged, known as the servient tenement. If held by reason of the ownership or possession of the dominant tenement it is regarded and defined as appurtenant to such dominant tenement, and is, of course, assignable and inheritable. (*Nellis v. Munson*, 108 N. Y. 453.) Each may, however, be held and enjoyed by an individual or party, distinct from any ownership of any lands or dominant tenement, and is then regarded as held and enjoyed in gross. A pure easement in gross is, generally speaking, neither assignable nor inheritable and is personal to the grantee. While an easement for a specified period always implies

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an interest in the land in or over which it is to be enjoyed, the right of *profit a prendre*, if it belongs in gross to a party, takes the character of an estate in the land itself, rather than that of a proper easement in or out of the same. (*Post v. Pearsall*, 22 Wend. 425.) This rule, arbitrarily established, perhaps, to accomplish the intent of parties and justice, radically differs from that concerning an ordinary easement in gross. The right of *profit a prendre* in gross is assignable and inheritable. The power to grant to a party by apt language the right, appurtenant or in gross, to enjoy, possess and use for profit the land of the grantor is undoubted. It includes such rights as those of severing and taking grass, clay, sand or ice, of pasturing live stock, of taking oil or minerals from the soil, or taking water that has been artificially accumulated, as in wells or cisterns, of cutting ice and of hunting and fishing. Such is the law of this jurisdiction. In England and some of our states, it seems to be established that a pure easement can only be held as appurtenant to a dominant tenement, and that an easement in gross amounts to no more than a mere license. In the instant case the rights of the plaintiff were not granted in favor of any dominant tenement or enjoyed by reason of holding any other estate. The instrument did not transfer the land, but gave to the plaintiff an incorporeal hereditament, a right to take upon the land salable water, and, as incidental and auxiliary, the right to use buildings, machinery and other property.

We are not required to determine whether or not the right to the plaintiff of taking and appropriating the waters of the springs constituted an easement proper or a *profit a prendre*. It has been held that the waters of a spring are not a part of the soil or a product of the soil and the taking of them is not a *profit a prendre*. It may well be doubted that the holding is applicable to the conditions existing in the instant case. There is, however,

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in judicial opinion no dissent to the proposition that the right of one taking water from a spring in the land of another is an easement, an interest in the land and an incorporeal hereditament. (Washburn's Easements & Servitudes, pp. 13, 118; *Goodrich v. Burbank*, 94 Mass. 459; *Manderbach v. Bethany Orphans' Home*, 109 Penn. St. 231; *Diffendal v. Virginia Midland R. R. Co.*, 86 Va. 459; *Race v. Ward*, 4 Ellis & B. 702; *Manning v. Wasdale*, 5 Adolphus & Ellis, 758; *Tyler v. Bennett*, 5 Adolphus & Ellis, 377; *Hankey v. Clark*, 110 Mass. 262; *Borst v. Empie*, 5 N. Y. 33.) The parties expressed in the writing their contemplation and intention that the rights granted by the state were, in fact, granted to the plaintiff. The rule of non-assignability of an easement in gross is not invocable to the defendant.

The instrument granted to the plaintiff complete and perfect rights of use and possession as described in it. It was operative and effective as a grant and vested in the plaintiff an unconditional interest or estate in the land. It was an agreement on the part of the state that the plaintiff should have and retain the real property—an incorporeal hereditament. A present conveyance of real property is an executed contract. An agreement to sell and convey is an executory contract. (*Farrington v. Tennessee*, 95 U. S. 679; *Neves v. Scott*, 9 How. [U. S.] 196, 211.) In *Fletcher v. Peck* (6 Cranch, 87, 137) Chief Justice MARSHALL said: "A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant. Since, then, in fact, a grant is a contract executed, the obligation of which still continues; and since the Constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors

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should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the Constitution, as a law discharging the vendors of property from the obligation of executing their contracts by conveyance. It would be strange if a contract to convey was secured by the Constitution, while an absolute conveyance remained unprotected." This language, as accurate as it is unambiguous, was used in reference to a grant of land by the governor of a state under a legislative act. The fact that the grantee is to perform in the future prescribed acts connected with or concerning the property conveyed does not transmute the grant. The instrument before us was a grant — a contract executed — because it conveyed to the plaintiff the complete and perfect right to enter into, possess and enjoy the real property described in it. The state, or the legislature, of course, could not repeal or abrogate the grant of real property made by it. (*Danolds v. State of N. Y.*, 89 N. Y. 36, 44; *People ex rel. Graves v. Sohmer*, 207 N. Y. 450.) The enactment of chapter 204 of the Laws of 1917, authorizing (among other things) the conservation commission to bottle and sell the surplus waters of the springs and making an appropriation for that purpose did not, therefore, affect the right of the plaintiff to the possession of the property in accordance with the grant. The act is weightless in determining the authority of the commissioners, who, for the state, executed the grant, and the rights of the plaintiff, the grantee of the state. The purpose and the act of the state, under the instrument of March, 1916, was to grant an easement proper or in the nature of a *profit à prendre* and rights and privileges incidental and auxiliary. The grant would not support an action of ejectment by the plaintiff which had not been wrongfully disseized of an actual possession of corporeal property. (*Child v. Chappell*, 9 N. Y. 246; *Woodhull v. Rosenthal*, 61 N. Y. 382.) The action in equity for injunctive relief from the

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possession or an interference by the defendant is the proper remedy. An injunction is the usual remedy invoked by the owner of a legal easement to remove an obstacle to its possession and enjoyment. The fact that there is neither privity of estate nor privity of contract between the owner and the aggressor is immaterial. (*Moore v. Brown*, 139 N. Y. 127; *Parker v. Nightingale*, 6 Allen, 341; *Hills v. Miller*, 3 Paige, 254.)

The acts of the defendant in preventing, by his anterior use and possession, the plaintiff entering into the rights and privileges granted it by the instrument were unauthorized and unlawful and constituted the defendant as an individual the wrongdoer. In them the defendant ceased to be a public officer and became a private wrongdoer. Chapter 204 of the Laws of 1917, in so far as it purported or was intended to adopt or confirm those acts, or violate the grant of the state to the plaintiff, destroyed property rights protected by the Constitution and was ineffective and immaterial. The acts of the defendant, although done in the name of himself as the conservation commission, or done by him while assuming to act as the conservation commissioner, were not and could not become lawful or regain to the state the property it had conveyed. An unconstitutional or void statute is not a law; it compels no one, binds no one, protects no one. Those acts bar the plaintiff from possessing and exercising its incorporeal rights and a function of a court of equity is to remove them. (*Litchfield v. Bond*, 186 N. Y. 66; *Tindal v. Wesley*, 167 U. S. 204.)

The judgment of the Appellate Division should be reversed and that of the Special Term affirmed, with costs in this court and the Appellate Division.

HISCOCK, Ch. J., CHASE, CARDOZO, POUND and ANDREWS, JJ., concur; CRANE, J., dissents.

Judgment reversed, etc.

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MILDRED MULLER, by MARY FINCK, Her Guardian ad Litem, Respondent, *v.* FRANCIS HILLENBRAND, Appellant.

MARY FINCK, Respondent, *v.* FRANCIS HILLENBRAND, Appellant.

Master and servant — when owner of apartment house not liable for injuries to child thrown off of sidewalk by janitor of the apartment house to prevent her from roller skating on sidewalk.

Plaintiff, an infant under fourteen years of age, recovered a judgment against defendant, the owner of an apartment house, for injuries received when the janitor of the apartment house threw, or pushed, her off the sidewalk in front of the apartment house where she had been roller skating. There is evidence that the tenants in the house had been annoyed by noise caused by children roller skating on the sidewalk in front of the apartments and had complained to the janitor and his wife with reference thereto, and that the janitor, acting on such complaints, had endeavored to prevent children from roller skating on the sidewalk. *Held*, in the absence of any evidence as to the actual authority conferred upon the janitor by the defendant, that the janitor in assaulting the infant plaintiff was not acting within the actual or apparent scope of his employment, and hence his act is not chargeable to the defendant.

Muller v. Hillenbrand, 179 App. Div. 831, reversed.

Finck v. Hillenbrand, 179 App. Div. 831, reversed.

(Argued November 24, 1919; decided January 6, 1920.)

APPEAL in each of the above-entitled actions from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 27, 1917, modifying and affirming as modified a judgment in favor of plaintiff entered upon a verdict.

The nature of the actions and the facts, so far as material, are stated in the opinion.

Stephen P. Anderton, Erving R. Philbin and Alfred W. Meldon for appellant. In determining whether an assault committed by a servant was within the scope of his employment, the law considers only the precise situation

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at the time of the assault itself. (*Girvin v. N. Y. C. & H. R. R. Co.*, 166 N. Y. 289; *McKay v. Hudson River Line*, 56 App. Div. 201.) Neither Friedman's assumed "desire to further the interests of his employer by preventing the annoyance to the tenants of which they had complained and endeavoring to promote their comfort and to keep them contented," nor the supposed benefit to defendant of his assault, suffice to bring his act within the scope of his employment. (*Kaiser v. McLean*, 20 App. Div. 326; *Kennedy v. White*, 91 App. Div. 475; *Connor v. Benenson Realty Co.*, 152 N. Y. Supp. 700; *Grimes v. Young*, 51 App. Div. 239; *Brown v. Jarvis Engineering Co.*, 166 Mass. 75; *Limpus v. London G. O. Co.*, 1 H. & C. 526.)

Henry Siegrist and *Edward Lauterbach* for respondents. The question as to whether Friedman committed the assault within the scope of his employment was properly submitted to the jury as one of fact. (*Mott v. Consumers Ice Co.*, 73 N. Y. 543; *Rounds v. D., L. & W. R. R. Co.*, 64 N. Y. 129; *Girvin v. N. Y. C. & H. R. R. Co.*, 166 N. Y. 289; *Sharp v. Erie R. R. Co.*, 184 N. Y. 100, 105; *Magar v. Hammond*, 183 N. Y. 387; *Craven v. Bloomingdale*, 171 N. Y. 439; *Palmeri v. Man. Ry. Co.*, 133 N. Y. 261; *Lynch v. Met. El. Ry. Co.*, 90 N. Y. 77; *Becker v. Borck*, 157 N. Y. Supp. 505; *Herrman v. New York Edison Co.*, 175 App. Div. 535; *Katz v. Lutz*, 176 App. Div. 460, 464; *Kennedy v. White*, 91 App. Div. 475; *Kurland v. Roach*, 165 N. Y. Supp. 807; 6 *Labatt's Master & Servant* [2d ed.], § 2364; *Dealy v. Coble*, 112 App. Div. 296.)

McLAUGHLIN, J. The infant plaintiff brought this action to recover damages for personal injuries alleged to have been sustained by reason of an assault committed upon her by defendant's janitor. The other action is by the infant's mother to recover damages resulting from such injuries. Each plaintiff had a verdict upon which judgment was entered for a substantial

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amount, and which, in each case, was modified by the Appellate Division, and as modified affirmed. Defendant appeals to this court.

On the 9th of September, 1914, the defendant was the owner of two seven-story apartment houses in the city of New York, of which one Friedman was the janitor. His duties as such were those usually performed by a janitor, and included keeping the halls and sidewalks clean, washing the windows and showing the apartments to prospective tenants. The infant plaintiff, at the time of the assault, was eleven years of age. No testimony was offered at the trial as to the actual authority conferred upon the janitor by the defendant, except that the janitor testified, on one occasion when he informed defendant that boys playing ball on the sidewalk had broken some windows, the defendant then instructed him that at any time thereafter when he saw boys playing ball and breaking windows, to call a police officer on the beat.

The evidence adduced at the trial tended to establish, and justified the jury in finding, that the tenants had been annoyed by the noise caused by children roller skating on the sidewalk in front of the apartments and had complained to the janitor and his wife with reference thereto. Acting on such complaints, he had endeavored to prevent children from roller skating on the walks. On the day named the testimony on the part of the plaintiff, which is corroborated by two of her companions, shows that immediately prior to the assault, she and three girls about her own age had been roller skating on the sidewalk for some considerable time; that the janitor went upon the sidewalk and addressing the plaintiff, who was then standing on the walk with her roller skates on, told her to get off the walk; that she refused to do so; that he then told her if she did not get off he would throw her off, and her reply was, "I would like to see you;" that he then grabbed her by the arm, threw or shoved her from the walk to the street, causing her to

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fall, and as she did so her back struck the curbstone and inflicted very serious injuries. Actions were thereafter brought against the owner of the apartment houses, with the result as above indicated.

The janitor, in assaulting the infant plaintiff, was not acting within the actual or apparent scope of his employment. Had the defendant been present he would have had no authority to do what the janitor did and what he could not legally do he could not, in a legal sense, authorize the janitor to do for him. (*Poulton v. L. & S. W. Ry. Co.*, 1867, L. R. 2 Q. B. 534; Pollock on Law of Torts [10th ed.], 97, 98.)

The rule of liability of a master for the acts of his servant is tersely stated in *Mott v. Consumers' Ice Co.* (73 N. Y. 543, 547). It is that "For the acts of the servant within the general scope of his employment, while engaged in his master's business, and done with a view to the furtherance of that business and the master's interests, the master will be responsible, whether the act be done negligently, wantonly, or even wilfully. * * *. But if a servant goes outside of his employment, and without regard to his service, acting maliciously, or in order to effect some purpose of his own, wantonly commits a trespass, or causes damage to another, the master is not responsible." To the same effect is *Girvin v. N. Y. C. & H. R. R. Co.* (166 N. Y. 289).

The infant plaintiff had a right to be upon the sidewalk and, so far as appears, to use it for roller skating, though she was not at the time the assault was committed using it for that purpose. If the act of there skating created such an annoyance to tenants as to, in effect, amount to a nuisance, then the janitor, if authorized by the owner of the apartments so to do, should have proceeded in a lawful way to abate the nuisance, instead of taking the law into his own hands and committing the assault which he did. He appreciated, on a former occasion, when boys were playing ball on the

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sidewalk, that he had no authority to throw them off, and when the master's attention was called to it, he told him what to do in the future.

It may very well be that the noise caused by roller skating on the sidewalk was annoying to the tenants, and that the janitor supposed he was furthering the master's interests by trying to prevent the annoyance, but this did not change the legal relation of the parties or confer upon him authority which the master himself did not possess. As the janitor was not engaged in performing any act connected with his employment, at the time of the assault, his act is not chargeable to the defendant. The plaintiffs' remedy, if they have any, is against the janitor and not the defendant.

Each judgment, therefore, should be reversed and each complaint dismissed, with costs in all courts.

COLLIN, HOGAN, CARDOZO, POUND and ELKUS, JJ., concur; HISCOCK, Ch. J., absent.

Judgments reversed, etc.

NICHOLAS GANGI, an Infant, by GIUSEPPI GANGI, His Guardian ad Litem, Respondent, *v.* JACOB FRADUS, Appellant.

GIUSEPPI GANGI, Respondent, *v.* JACOB FRADUS, Appellant.

Evidence — admissions — probative value and effect of admissions — rules for instructing juries as to such evidence — erroneous instructions to jury — exceptions to charge and restatement of erroneous parts thereof.

1. In a civil action, statements made out of court or of judicial proceeding or record, or, as they are denominated, extra-judicial admissions, by a party to the action, adverse to his claim, are evidence against him that the facts they state are true. They have two phases for the jury's consideration; the one, were they made; the other, their effect. In neither phase have they any character or quality peculiar to themselves, or distinguishing them from the other facts in evidence.

2. In instructions to the jury concerning such admissions, the

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trial justice may profitably and without error, as the evidence justifies, bring to the jury's attention and guidance the rules of law that the probative effect and value of an admission depend upon the conditions and circumstances under which it was made, and upon any other circumstances which may affect or tend to explain such admissions, but it is for the jury itself, in the light of reason and with the exercise of caution, to determine whether the admissions were made, and if made, the value thereof.

3. Where in the trial of an action based upon the alleged negligence of the defendant, statements or admissions by the infant plaintiff contradictory of the cause of action were introduced in evidence by the defendant, it was error for the trial justice to instruct the jury, in substance, that evidence of admissions against the interest of a party was not equal in weight or value to that given by disinterested witnesses and that, as matter of law, such evidence has weak probative value.

4. Appellate courts are not diligent in seeking a way to deprive a party of the benefit of an exception pointing out error, where it appears that the trial justice was fully apprised of the nature of the objection. Where a trial justice, in an additional charge made in response to an exception to his main charge, repeats in substance or effect the erroneous part to which the exception was taken, a renewal of the exception is not required.

Gangi v. Fradus, 187 App. Div. 934, reversed.

(Argued December 1, 1919; decided January 6, 1920.)

APPEAL in the first above-entitled action, by permission, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 24, 1919, unanimously affirming a judgment in favor of plaintiff entered upon a verdict.

Appeal in the second above-entitled action from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 24, 1919, modifying and affirming as modified a judgment in favor of plaintiff entered upon a verdict.

The nature of the actions and the facts, so far as material, are stated in the opinion.

Walter L. Glenney and Bertrand L. Pettigrew for appellant. The trial justice erroneously charged the jury as to the value of admissions made by the infant plaintiff

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prior to the trial. (1 Greenl. on Ev. § 200; *Tousey v. Hastings*, 194 N. Y. 79; *Comm. v. Knapp*, 26 Mass. 495; 1 Wigmore on Ev. § 866.)

Thomas J. O'Neill and *Leonard F. Fish* for respondents. There was no error in the charge. (1 Greenl. on Ev. § 260; *Gallet v. Lord Keith*, 4 Esp. 912; *Garrison v. Akin*, 2 Barb. 25; *Hoellerer v. Kaplin*, 19 Misc. Rep. 539; *Whitman v. Foley*, 7 N. Y. Supp. 310; *Botsford v. Burr*, 2 Johns. Ch. 405; *Marks v. Pell*, 1 Johns Ch. 594; *Savant v. Hesdra*, 5 Redf. Surr. 47; *Cunningham v. Burdell*, 4 Brod. Sur. 340; *Boyd v. McLean*, 1 Johns. Ch. 582; *Kehr v. Stauf*, 12 Daly, 15; *Law v. Merrill*, 6 Wend. 268; *Mallin v. Mallin*, 1 Wend. 625.) There was no valid exception to the charge. (*Clark v. N. Y. C. & H. R. R. Co.*, 191 N. Y. 422.)

COLLIN, J. The two actions are based upon the alleged negligence of the defendant Jacob Fradus, by which personal injuries to the infant Nicholas Gangi were caused. The one is in behalf of the infant; the other in behalf of his father for the loss of his services. They were tried together, and a verdict in favor of each plaintiff was rendered. The Appellate Division unanimously affirmed the consequent judgments, that in favor of the father being first modified by a reduction in its amount.

The judgments must be reversed, because of errors in the charge of the trial justice to the jury. Upon the trial statements or admissions by the infant plaintiff contradictory of the cause of action were introduced in evidence by the defendant. Concerning them the trial justice in his main charge instructed the jury: "In regard to the evidence adduced by the defendant company, called generally evidence of admissions against the interest of a person, that matter is to be considered and you are to ascribe to it such weight as you consider is a proper amount of consideration or weight to be given to it. Of course, such evidence is not equal in weight or

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value to that given by disinterested witnesses who are in a position of observation of the truth with respect to the manner of the happening of the accident. * * * It is as a matter of law regarded as probatively weak evidence — that is, admissions of one party said to have been made to another, or to the representative of another, have not a high degree of quality in evidence. It is evidence, however, which has probative value provided it be believed, and if you concluded that the boy stated to this employee of the defendant and in the presence of the other persons employed for the purpose of attending there, that he got up and ran into the truck; if you believe that that coincided with the evidence as to what actually happened, then you would find accordingly and against the infant. If, however, you believe either that the matter taken down did not contain any such statement from the boy, or that if such statement was made by the boy it was under the pressure of the interview, whether inadvertently or not, you have the power of disregarding the evidence of admission against interest, as either not probative enough to satisfy your minds or made in such manner as not to beget an assurance and accuracy which is necessary to find the truth. * * *. In response to defendant's exception, "I except to Your Honor's statement that the admissions of the infant plaintiff were not entitled to be received as having much probative value," the trial justice said: "I did not say precisely that. I said that they were not of a high degree in quality of proof, but I said if they believed them, and found that there was proof of that character that conformed to the other evidence in the case, and that they were convinced that the statements were made and were accurate as made, then the boy could not recover. * * * I said that admissions against interest when proven by witnesses called by the adversary are not of a high degree of quality in probative value. * * * I said they are not of a high degree of quality of probative value con-

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sidered by themselves. It is a degree of evidence which is not as high a degree of evidence as some other kinds of evidence, but if believed it is just as good as any other kind of evidence, and jurors may follow it if they think it is sufficiently probative to their minds."

The charge, as given, was fundamentally erroneous and prejudicial. While the discernment of the real instruction or guidance, if any, it imparted is difficult and uncertain, certain it is that it was ill-conceived and misleading. There is not a rule of law that admissions of a party to a civil action are probatively weak evidence, or have not a high degree of quality in proof, or have probative value provided they are believed, or are dependent for an effect upon coincidence "with the evidence as to what actually happened" or a conformity to the other evidence in the case. The admissions of the infant plaintiff were in evidence and, in the action in his behalf, at least, properly. They to an extent contradicted or were inconsistent with his claim or cause of action. In a civil action, statements made out of court or of judicial proceeding or record, or, as they are denominated, extra-judicial admissions, by a party to the action, adverse to his claim, are evidence against him that the facts they state are true. (*Koester v. Rochester Candy Works*, 194 N. Y. 92.) They have two phases for the jury's consideration: the one, were they made; the other, their effect. In neither phase have they any characteristic or quality peculiar to themselves, or distinguishing them from the other facts in evidence. It is with them, as with the other facts in evidence, the jury may find they were not made or do not exist. If found to exist, the jury in determining their effect, or probative value or weight, must apply to them the rule of reason. The effect they have, in reason and sound judgment, upon the mind of the jury, in view of their language, character, the time when and person to whom they were made, the circumstances and conditions attending their making,

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and the other facts in evidence, is the effect they should have upon the claim of the party. In case they were made in ignorance of the facts or in an abnormal state of mind, or were based in part upon mere opinion, or were made casually or thoughtlessly or insincerely, or under like or analogous conditions or circumstances, they may, in reason, deserve slight consideration or value or none at all. In case they were made understandingly and deliberately, are of pure fact within the knowledge of the declarant, and were made under conditions and circumstances conducive to veracity, and are not overborne by the other facts in evidence, they may, in reason and sound judgment, establish a cause of action or a defense. Whether they are of the one class or the other, or intermediate, is for the determination of the jury. The effect they shall have upon the issues being tried is for their determination. The trial justice may not instruct as to the rank assignable to them or the influence to be yielded by them. The jury may accept a part as true and put aside a part as not true. In those respects the law has no gauge. The jury shall determine whether or not they were made; if made, the conditions and circumstances under which they were made and the effect thereof, and their probative weight and value, which may range from the lowest, or none at all, to conclusiveness. The trial justice may profitably and without error, as the evidence justifies, bring to the jury's attention and guidance the rules of law that the probative effect and value of an admission depend upon the conditions and circumstances under which they were made, the time which has since elapsed and the cogency or reasonableness of the explanation, if any, of the making and other like grounds or conditions.

The trial justice should also, as the evidence makes useful and proper, instruct the jury concerning the degree of scrutiny and caution in determining whether or not the admissions were in truth made. Judicial opinion

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is, at times, not clear, if not misleading, through treating without distinction the evidence of the making of the admission with that of the contents of the admission. The making of an admission of strong effect may have in support only faint and dubious evidence, without justifying the declaration that admissions are a weak or dangerous kind of evidence. The weakness or danger is, in such case, in the proof of the making and not in the contents of the admission. Instructions of scrutiny and caution, as the evidence warrants, in accepting the admissions as made, may well be given. To remember and narrate accurately the statements of another is difficult. The narrator may be thoroughly honest in his belief that he has given the exact words of the admission, and be mistaken. Transposition of a word or words in the narration may give a meaning other than the real. A listener is liable to misunderstand or forget what was really said or intended by the declarant, or to incorrectly relate it. A word, or a look, misunderstood, may produce upon his mind a meaning different from that which the declarant intended to convey. The declarant may not have expressed his meaning. Admissions are easily fabricated or imagined. Differing conditions may require or should receive from the jury varying degrees of scrutiny, analysis and caution. It is entirely proper for the trial justice, if the evidence permits, to bring to the attention of the jury the considerations stated, or others of similar character, as reasons for caution and a careful and zealous scrutiny of the evidence of the making. They are such as to impress any man of common sense. We repeat, it is, however, for the jury to determine whether or not the admissions were made, the facts and conditions which affect the probative value, and the value itself.

The exception of the defendant enables us to review the part of the charge we have been considering. It did in fact call the attention of the trial justice to it and the claimed error. The essential function of an exception

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is to direct the mind of the trial justice to the point in which it is supposed that he has erred in law so that he may reconsider it and change his ruling if convinced of error. Appellate courts are not diligent in seeking a way to deprive a party of the benefit of an exception pointing out error, where it appears that the trial justice was fully apprised of the nature of the objection. (*Stephens v. Ely*, 162 N. Y. 79.) When the trial justice, in response to an exception, in an additional charge repeats in substance or effect the erroneous part to which the exception was taken, a renewal of the exception is not required.

Inasmuch as the admissions of the infant were received, without objection, as competent and relevant in the suit in behalf of the father, we do not consider their admissibility or effect in that action.

The judgments should be reversed and new trials granted, with costs to abide the event.

HISCOCK, Ch. J., CHASE, HOGAN, McLAUGHLIN, CRANE and ANDREWS, JJ., concur.

Judgments reversed, etc.

NANCY H. BOWMAN, Appellant, *v.* THE TOWN OF CHENANGO, Respondent.

Highways — towns — liability of town for improper construction of culvert by town superintendent, causing flooding of adjacent land — pleading — sufficiency of complaint.

1. At common law, commissioners of highways of towns were personally responsible for the negligent or wrongful performance of their duty. The right of action against commissioners who act contrary to or omit to act in accordance with their duty is by statute made maintainable against the town. It is not limited to acts or omissions which interfere with travel along the surface of the highway, but includes unlawful discharge of water on the lands of another by defective construction and care of culverts and sluices.

2. Where a complaint in an action against a town alleges in substance that a steel and concrete culvert, over a small dry creek, flowing in times of freshet, was so negligently constructed and maintained across

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a highway by the defendant's superintendent of highways, in place of an adequate old wooden culvert, that on two occasions when rainstorms occurred it was inadequate to care for the water which flowed down the creek, causing it to back up and overflow upon plaintiff's land, thus damaging her property, such allegations sufficiently charge an unlawful act of the superintendent of highways and constitute a cause of action against the town under the statute (Highway Law [Cons. Laws, ch. 25], §§ 47, 75), since it alleges that the damages sustained were caused by reason of a defect in the culvert, which is a part of the highway, because of the neglect of the town superintendent. (Highway Law, § 74.) (*Winchell v. Town of Camillus*, 109 App. Div. 341; affd., without opinion, 190 N. Y. 536; *Whitney v. Town of Ticonderoga*, 127 N. Y. 40, explained; *Gould v. Booth*, 66 N. Y. 62, distinguished.)

Bowman v. Town of Chenango, 184 App. Div. 472, reversed.

(Argued December 8, 1919; decided January 6, 1920.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered June 13, 1918, affirming a judgment in favor of defendant entered upon an order of Special Term sustaining a demurrer to and directing a dismissal of the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

Thomas B. Merchant for appellant. The complaint states facts sufficient to constitute a cause of action. (*Whitney v. Town of Ticonderoga*, 127 N. Y. 40; *Winchell v. Town of Camillus*, 109 App. Div. 341, 190 N. Y. 536; *Ashberry v. Town of West Seneca*, 33 N. Y. S. R. 431; *Dye v. Town of Cherry Creek*, 87 Misc. Rep. 207; *Flansburg v. Town of Elbridge*, 205 N. Y. 423; *Lynch v. Town of Rhinebeck*, 210 N. Y. 101; *Byrnes v. City of Cohoes*, 67 N. Y. 204; *Noonan v. City of Albany*, 79 N. Y. 470; *Vogel v. City of New York*, 92 N. Y. 10; *Seifert v. City of Brooklyn*, 101 N. Y. 136.)

Frederick W. Welsh for respondent. A town is not liable to the owner of lands abutting upon a highway for damages to the abutting lands caused by a defect in the highway

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or bridge. (*People ex rel. Van Keuren v. Town Auditors*, 74 N. Y. 315; *People ex rel. Everett v. Bd. of Suprs.*, 93 N. Y. 397; *People ex rel. Morey v. Town Board*, 175 N. Y. 397; *Markey v. County of Queens*, 154 N. Y. 675; *Lorillard v. Town of Monroe*, 11 N. Y. 392; *Lynch v. Town of Rhinebeck*, 210 N. Y. 101; *Lane v. Town of Hancock*, 142 N. Y. 510; *McGuinness v. Vil. of West Chester*, 66 Hun, 356; *Winchell v. Town of Camillus*, 109 App. Div. 341; 190 N. Y. 536; *Whitney v. Town of Ticonderoga*, 127 N. Y. 40.)

POUND, J. Plaintiff's complaint alleges in substance that a steel and concrete culvert, over a small dry creek, flowing in times of freshet, was so negligently constructed and maintained across a highway by the defendant's town superintendent of highways, in place of an adequate old wooden culvert, that on two occasions when rainstorms occurred, it was inadequate to care for the water which flowed down the creek, causing it to back up and overflow upon plaintiff's land, thus damaging her property. Does it state a cause of action?

"The common law of this state gives a right of action against commissioners of highways, who act contrary to or omit to act in accordance with their duty to a person injured thereby, and this right of action it is which the statute (L. 1881, ch. 700, now § 75 of the Highway Law) made maintainable against the town." (*Flansburg v. Town of Elbridge*, 205 N. Y. 423, 428.)

The town superintendent of highways shall among other duties imposed on him in relation to the care and superintendence of highways, "construct and keep in repair sluices and culverts and cause the waterways, bridges and culverts to be kept open." (Highway Law [Cons. Laws, ch. 25], § 47.)

The question is whether the damages alleged are, in the language of the statute, sustained "by reason of any defect in (defendant's) highways or bridges, existing

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because of the neglect of any town superintendent of such town." (Highway Law, section 74; *Lynch v. Town of Rhinebeck*, 210 N. Y. 101.) That the culvert is a part of the highway and a defect in the culvert is a defect in the highway is manifest.

Defendant contends that the commissioner (now superintendent) of highways was not liable at common law for damages to property due to acts done in the performance of his duty, of the character set forth in the complaint, and that, therefore, the town is not liable.

Prior to the adoption of the statute of 1881 above referred to, the towns were not liable for damages to persons or property caused by defective highways. The commissioners of highways were personally responsible for the negligent or wrongful performance of their duty. Their liability was carefully and wisely guarded. They did not neglect their duty to make repairs when funds were not provided for the purpose (*Garlinghouse v. Jacobs*, 29 N. Y. 297), nor, when doing what they had a legal right to do, they failed to exercise the best judgment or omitted to perform an act which would be neighborly, such as properly taking care of mere surface water so that it would not back up on the lands of an abutting owner. (*Gould v. Booth*, 66 N. Y. 62.) But this court has never held that a commissioner of highways, in the exercise of lawful dominion over the highways, might unlawfully cast water upon another's land. If the commissioner, in the course of highway construction, wrongfully cast material on the lands of another, he was hedged by no divinity. It has been said (*Gould v. Booth, supra*) that he might lawfully interfere with the natural flow of water from rain and snow upon the surface of the land. It follows not that he might turn upon the lands of another the water which previously flowed across the highway in a natural channel. For such water he is bound to provide a sufficient outlet. (*Barkley v. Wilcox*, 86 N. Y. 140, 144; *Hill v. City of Boston*, 122 Mass. 344, 358.)

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The complaint alleges a negligent obstruction by defendant's superintendent of highways of the natural channel of the water by the insufficiency of the culvert, by means of which the water was thrown upon plaintiff's property to her injury, and thus sufficiently charges an unlawful act of the superintendent.

The contention that the commissioner might, in the construction or maintenance of highways, damage property with impunity if he did not interfere with travel along the surface of the highway has no foundation in any reported case and never was the law. In *Whitney v. Town of Ticonderoga* (127 N. Y. 40) the action was under the statute and the court was dealing with an injury to person sustained by one who ran over a scraper used for working highways which had been negligently left in the road. BRADLEY, J., very properly said, in this connection, that the term "defective highways" was used in the statute in reference to their condition for public travel upon them and that the impairment of a highway for public use may be no less by an obstruction placed upon its surface where there is no defect in the bed of the road than by a physical disturbance of the bed of the roadway. He was not dealing with other defects nor with injury to property. When the learned justice writing the opinion in *Winchell v. Town of Camillus* (109 App. Div. 341, 344; affirmed, without opinion, 190 N. Y. 536), a surface water case, cited the *Ticonderoga* case, he had already disposed of the question before the court on the authority of *Gould v. Booth* (*supra*), which was directly in point. He then said, by way of *dictum*, that even if a recovery could be had against the commissioner, the town was not liable, "because the statute was intended to cover no such liability, but only such liability as resulted from defects in the highway, interfering with travel along the same."

The second question of substance in this case is thus suggested. The legislature might, in its discretion, have

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so limited the liability of the town. Has it done so? Does the statute impose upon the town the full common-law liability of the commissioner for his misconduct or neglect if it results in a defective highway or only so much of such liability as results in an interference with travel along the highway?

The influence of phrases in opinions, forcibly taken from the context and applied to different facts, is illustrated by the result in this case. BRADLEY, J., said in the *Whitney Case* (*supra*), on the facts there presented, that "the term 'defective highways' was used in reference to their condition for public travel upon them." The word "only" has been added to what he said and a general rule evolved that the town may, through the official act of the superintendent of highways, negligently construct a highway, bridge or culvert, defective in any regard other than for travel and may thereby unlawfully damage property without incurring legal liability. A construction intended to extend town liability beyond the limits that a crabbed reading of the statute might suggest has thus been distorted into a limitation upon such liability. But, as we have said, the entire right of action against the commissioner for his misconduct or neglect is now maintainable against the town. (*Flansburg v. Town of Elbridge*, *supra*.)

It is urged that the town is not liable because the culvert was carefully constructed according to plans imposed upon it by the state. The fact does not appear upon the face of the complaint. We are dealing only with the sufficiency of a pleading.

The judgments appealed from should be reversed and the demurrer overruled, with costs in all courts, with leave to defendant to answer within twenty days on payment of costs.

HISCOCK, Ch. J., HOGAN, CARDOZO, McLAUGHLIN, ANDREWS and ELKUS, JJ., concur.

Judgments reversed, etc.

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**HYMAN GOLDBERG, an Infant, by SAMUEL GOLDBERG,
His Guardian ad Litem, Appellant, v. BORDEN'S CON-
DENSED MILK COMPANY, Respondent.**

**Master and servant — injuries to boy riding on milk wagon
at invitation of the driver —when owner of wagon not liable.**

Where defendant, a corporation engaged in the selling and delivery of milk, had given explicit directions to the driver of a milk wagon not to allow children to ride in his wagon, and a corresponding rule was printed in the route book given to him, and a notice to the same effect posted in the defendant's office, the driver had no right or authority to invite the plaintiff, a boy about eleven years of age, to ride with him, and when he did so he acted outside the scope of his employment, and hence the defendant is not responsible for the injuries to plaintiff caused by the negligence of the driver while plaintiff was riding with him.

Goldberg v. Borden's Condensed Milk Co., 185 App. Div. 222, affirmed.

(Argued December 8, 1919; decided January 6, 1920.)

APPEAL from a judgment, entered December 12, 1918, upon an order of the Appellate Division of the Supreme Court in the second judicial department, reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

Jay S. Jones, Edward J. Fanning and Henry M. Dater for appellant. The defendant was clearly liable to the plaintiff for the injuries sustained by him through the negligence of the driver. (*Eaton v. D., L. & W. R. R. Co.*, 57 N. Y. 382; *Grimshaw v. L. S. & M. S. R. R. Co.*, 205 N. Y. 371; *Barry v. N. Y. C. & H. R. R. Co.*, 92 N. Y. 289; *Royal Indemnity Co. v. P. & W. Refining Co.*, 98 Misc. Rep. 631; *Kane v. Sperry & Veale Co.*, 175 App. Div. 998; *Nudelman v. Borden's Condensed Milk Company*,

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77 Misc. Rep. 103; *Royal Indemnity Company v. Platt & W. Ref. Co.*, 98 Misc. Rep. 631; *Adams v. Tozer*, 163 App. Div. 751; *Damm v. Kahn*, 98 Misc. Rep. 648.)

George O. Redington and Walter Engells for respondent. The act of the driver in inviting the Goldberg boy to ride in the wagon whether for pleasure or to assist him in the work was not only beyond his actual authority, but beyond the apparent scope of his authority as well. (*Timpson v. Allen*, 149 N. Y. 519; *Edwards v. Dooley*, 120 N. Y. 551; 2 Mecham on Agency [Ed. 1914], § 1875; *Fiesel v. New York Edison Co.*, 123 App. Div. 676; *Cannon v. Fargo*, 138 App. Div. 20; *Denton v. Morgan*, 166 App. Div. 119; *Marks v. Rochester Railway Co.*, 41 App. Div. 66; *Marks v. Rochester Railway Co.*, 77 Hun, 77; 146 N. Y. 181; *Eaton v. D., L. & W. R. R. Co.*, 57 N. Y. 382; *Morris v. Brown*, 111 N. Y. 318; *Finley v. Hudson El. Ry. Co.*, 64 Hun, 373; 146 N. Y. 369; *McDonough v. Pelham H. E. Co.*, 111 App. Div. 585.)

McLAUGHLIN, J. The plaintiff, a newsboy about eleven years of age, early in the morning on the 27th of August, 1916, was standing on the corner of Marcy avenue and South Fifth street in the city of Brooklyn, N. Y., waiting for a newsdealer to deliver papers to him. While standing there a milk wagon of the defendant, driven by one Huber, a regular driver and route salesman whom he knew, came along Marcy avenue and stopped on the corner of South Fifth street, with the right side of the wagon about a foot from the curb. Huber called to the plaintiff to have a ride. Thereupon plaintiff crossed the street, took hold of the front handle in the side door of the wagon, but had not gotten into the body of it, when Huber whipped up his horse, and the wagon was started so suddenly that plaintiff was thrown to the ground and seriously injured. Action was brought to recover damages therefor. Plaintiff had a verdict, which

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was reversed and the complaint dismissed by the Appellate Division, second department, one of the justices dissenting, and he now appeals to this court.

Huber had been in defendant's service for several months. When he was employed he was given explicit instructions not to allow children to ride in the wagon. There was also printed inside the cover of the route book given to him: "Route salesmen must not allow children in the wagons." A notice was posted in the defendant's office that "It is absolutely against the rules and regulations of the company to have boys on the wagons and also against the laws of the State." Huber had, however, without defendant's knowledge, on several occasions prior to the time the accident occurred, permitted plaintiff to get on the wagon and help make deliveries, for which he personally paid him. Huber testified that in a few instances, when one of the defendant's inspectors approached, he would tell the boy to get out of the wagon and would chase him away. The plaintiff denied knowledge of defendant's rules forbidding children to ride on the wagon, but did not contradict the testimony of Huber as to warning him away when the inspector appeared.

Huber had no authority to invite the plaintiff to ride; in fact he was acting contrary to express orders of his employer. When he gave the invitation he did an act outside the scope of his employment and the defendant was not responsible for the injuries caused by the driver's negligence while plaintiff was thus riding.

The judgment was properly reversed and the complaint dismissed, and the judgment here appealed from should be affirmed, with costs, on the authority of *Rolfe v. Hewitt*, decided herewith.

HISCOCK, Ch. J., HOGAN, CARDOZO, POUND, ANDREWS and ELKUS, JJ., concur.

Judgment affirmed.

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JOSEPHINE A. BEECHER et al., as Executors of JAMES C. BEECHER, Deceased, et al., Appellants, *v.* PETER A. VOGT MANUFACTURING COMPANY et al., Respondents.

Attorney and client — judgment — set-off — lien of attorney upon judgment in his client's favor — such judgment cannot be set off against another except subject to the lien of the attorney.

Under the statute (Judiciary Law [Cons. Laws, ch. 30], § 475) an attorney has a lien upon his client's cause of action which attaches to a judgment in his client's favor "and the proceeds thereof in whosoever hands they may come," and where judgment debtors have purchased a judgment against their judgment creditor and seek, in an action in equity, to have the judgment assigned to them set off against the judgment which they owe, such set-off cannot be allowed except subject to the lien of the attorneys of the party who obtained the judgment against them.

Beecher v. Vogt Manufacturing Co., 184 App. Div. 962, affirmed.

(Argued December 10, 1919; decided January 6, 1920.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered June 10, 1918, affirming a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Vernon Cole for appellants. The rights of the plaintiffs to offset the judgment are superior to the rights of the defendants Stanley & Gidley by way of attorneys' lien. (*Manning v. N. Y. C. P.*, 13 Wend. 647; *Perry v. Chester*, 53 N. Y. 240; *Matter of Heinsheimer*, 214 N. Y. 361.)

Ray M. Stanley for respondents. The lien of an attorney for services is prior and superior to any right of offset.

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(*Marshall v. Meech*, 51 N. Y. 140; *Peri v. N. Y. C. R. R. Co.*, 152 N. Y. 521; *Fischer-Hansen v. B. H. R. R. Co.*, 173 N. Y. 492; *Matter of Heinsheimer*, 214 N. Y. 361; *Barry v. T. A. R. R. Co.*, 87 App. Div. 443; *A. Ins. Co. v. Smith*, 112 App. Div. 840; *Webb v. Parker*, 130 App. Div. 92; *Kretsch v. Denofino*, 137 App. Div. 617; *Smith v. Cayuga Lake Cement Co.*, 107 App. Div. 524; *Matter of Steele*, 165 App. Div. 683; *Smith v. F. Nat. Bank*, 170 N. Y. Supp. 127.)

CARDOZO, J. On October 27, 1916, the Peter A. Vogt Manufacturing Company recovered a judgment for a sum of money against Beecher and Smith, as executors of James C. Beecher, and against Smith individually. On October 28, 1916, the German-American Bank of Buffalo recovered a judgment for a sum of money against the Peter A. Vogt Manufacturing Company. The latter judgment was assigned to the executors of Beecher, who in turn assigned to Smith an undivided interest. This action is brought by the executors and Smith to set off the judgment which they own against the judgment which they owe. The defendants are the Peter A. Vogt Manufacturing Company, now insolvent, and the latter's attorneys. The set-off has been decreed, but subject to the attorneys' lien. We are to determine whether the lien should have been subordinated to the set-off.

The case revives the smouldering fires of an ancient judicial controversy. The beginnings may be traced to England. When judgment was to be set off against judgment, the King's Bench stood out for the superior right of its attorneys, and maintained the lien for costs (*Mitchell v. Oldfield*, 4 Term Rep. 123). The Common Pleas took the opposite view, and held the right of set-off superior to the lien (*Vaughan v. Davies*, 2 H. Bl. 440). The 93rd rule of Hilary Term, 2 Wm. IV (1832), gave the victory to the attorneys (*Davis v. Rees*, 1904, 2 K.

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B. 435). In the meantime, the controversy had spread across the seas. In 1822, Chancellor KENT, in deciding the case of *Mohawk Bank v. Burrows* (6 Johns. Ch. 317, 321) adopted the practice of the English Common Pleas. His view was that only "the clear balance" which was "the result of the equity between the parties" was subject to the lien. He held with ROOK, J., in *Hall v. Ody* (2 B. & Pull. 28), that "the attorney looks, in the first instance, to the personal security of his client, and if beyond that he can get any further security into his hands, it is a mere casual advantage." Some years later, in 1829, and again in 1834, Chancellor WALWORTH refused to follow KENT, denounced the existing practice as unfair, and subordinated the set-off to the lien (*Dunkin v. Vandenbergh*, 1 Paige, 622; *Gridley v. Garrison*, 4 Paige, 647). But the triumph of the attorneys was short-lived. In 1836, the Court for the Correction of Errors reversed WALWORTH and followed KENT (*Nicoll v. Nicoll*, 16 Wend. 446), distinguishing, however, between set-off on summary motion and set-off "on bill filed or a trial at law." It was common practice then to set off judgments on motion (*Mason v. Knowlson*, 1 Hill, 218, 222; *Graves v. Woodbury*, 4 Hill, 559). The practice did not "at all depend on the statute of set-off," which was followed merely as "a rule of analogy," but "upon the jurisdiction of the courts over the parties and over their own process" (*People ex rel. Manning v. N. Y. Common Pleas*, 13 Wend. 649, 652; *Dunkin v. Vandenbergh*, *supra*, p. 624). On such applications, the courts had a discretion to grant or refuse relief. "But when we come to a bill filed or a trial at law, there is no discretion" (*Nicoll v. Nicoll*, *supra*, p. 448). In trials at law, the question was simply whether the set-off came within the statute. On bill in equity, the governing principle was the rule of analogy. "*Equitas sequitur legem*, whether the set-off be within the words or the spirit of the act" (*Nicoll v. Nicoll*, *supra*, p. 449). The

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rule of analogy was thought to prohibit the preservation of the lien.

The decision in *Nicoll v. Nicoll*, though it aimed to settle the practice, did not wholly attain its purpose. The rule there announced was obeyed grudgingly, with frequent animadversions upon its inequity and rigor (*Fitch v. Baldwin*, Clarke's Ch. Rep. 433; *Roberts v. Carter*, 17 How. Pr. 341, 343; *Martin v. Kanouse*, 17 How. Pr. 146, 148; *Ward v. Wordsworth*, 1 E. D. Smith, 598). When discretion was not excluded, the lien sometimes prevailed (*Ward v. Wordsworth, supra*; *Martin v. Kanouse, supra*). As late as 1873, this court said that there was still "some confusion in the authorities" upon the question whether the lien or the right of set-off was superior in equity (*Perry v. Chester*, 53 N. Y. 240, 243). In the case in which that was said, special facts made it unnecessary to re-examine the general rule. They led, however, to a decision which points the way to a solution of the problem under the statutes now in force. The decision turned upon the fact that there had been an assignment by the client to the attorney of the costs to be recovered. This assignment of prospective costs, though its subject-matter was a fund not yet in existence, was held superior to the right of set-off after judgment as well in equity as at law. (See also: *Mackey v. Mackey*, 43 Barb. 58; *Graves v. Woodbury*, 4 Hill, 559; *Firmenich v. Bovee*, 1 Hun, 532, 535; *Zogbaum v. Parker*, 55 N. Y. 120.)

We think that amendments of the statute have put attorneys generally in the same position as the attorney whose lien was thus preserved in *Perry v. Chester*. At common law, the charging lien of the attorney did not arise until judgment, and, while the action was pending, might be defeated by an honest settlement (*Coughlin v. N. Y. C. & H. R. R. Co.*, 71 N. Y. 443, 447, 450; *Fischer-Hansen v. B. H. R. R. Co.*, 173 N. Y. 492, 497). To-day he has a lien "upon his client's cause of action,"

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which "attaches to a verdict, report, decision, judgment or final order in his client's favor, and the proceeds thereof in whosoever hands they may come;" and the lien "cannot be affected by any settlement between the parties before or after judgment" (Code Civ. Pro. sec. 66, as amended by L. 1879, ch. 542; L. 1899, ch. 61; Judiciary Law, sec. 475; Consol. Laws, chap. 30; *Fischer-Hansen v. B. H. R. R. Co.*, *supra*; *Matter of Heinsheimer*, 214 N. Y. 361, 365). His position has become the same as that of an equitable assignee (*Marshall v. Meech*, 51 N. Y. 140, 143; *Coughlin v. N. Y. C. & H. R. R. Co.*, *supra*, p. 449; *Ennis v. Curry*, 22 Hun, 584; *Lauer v. Dunn*, 115 N. Y. 405, 409). No longer is it true that his services up to judgment are solely on "the personal security of his client" and that anything beyond is "a mere casual advantage" (Rook, J., in *Hall v. Ody*, *supra*, quoted by KENT, Ch., in *Mohawk Bank v. Burrows*, *supra*). From the beginning of the lawsuit, he stands as stood the attorney in *Perry v. Chester*, who held an equitable assignment, and thus gained the better right. In such circumstances, set-off of judgments, to the destruction of the lien, is neither within the words nor within the spirit (*Nicoll v. Nicoll*, *supra*) of the statutory law of counterclaim; and so the Appellate Divisions, though with little discussion of the earlier authorities, have repeatedly adjudged (*Barry v. Third Ave. R. R. Co.*, 87 App. Div. 543; *Smith v. Cayuga Lake Cement Co.*, 107 App. Div. 524; *Agricultural Ins. Co. v. Smith*, 112 App. Div. 840; *Webb v. Parker*, 130 App. Div. 92; *Kretsch v. Denofrio*, 137 App. Div. 617). It is not within the words, for the statute regulates the procedure before judgment, and not afterwards (Code Civ. Pro. secs. 501, 502). It is not within the spirit, for the statute in its whole framework evinces the purpose of the law-makers that the claims of assignees shall be protected against counterclaims arising from separate transactions and acquired with notice of the assignment (Code Civ.

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Pro. sec. 502; *Seibert v. Dunn*, 216 N. Y. 237; *Matter of Nunez*, 226 N. Y. 246, 251). It follows, therefore, that equity, if it were to override the lien, would not be adhering by analogy to any rule obeyed by courts of law *in consimili casu*. The rule of analogy, even if we assume it to have pointed against the attorney in the days of *Nicoll v. Nicoll*, now points the other way.

With the grip of the statute thus released, there need be little hesitation in choosing the path to follow. It is true that relief in equity by setting off one judgment against another is granted, not of right, but in the exercise of discretion (*De Camp v. Thomson*, 159 N. Y. 444; *Alexander v. Durkee*, 112 N. Y. 655). The discretion, however, is not unregulated by principle. "The courts of law and equity follow the same general doctrines on the subject of set-off" (KENT, Ch., in *Duncan v. Lyon*, 3 Johns. Ch. 351, 358; *Dale v. Cooke*, 4 Johns. Ch. 11). Debts, to be applied against each other, must be mutual (*Sawyer v. Hoag*, 17 Wall. 610; *Libby v. Hopkins*, 104 U. S. 303; *Morris v. Windsor Trust Co.*, 213 N. Y. 27, 29). To be mutual, they must be due to and from the same persons in the same capacity (*Dale v. Cooke, supra*). Assignees are not to be held subject to the burdens of independent counterclaims accruing after the assignment (*Matter of Nunez, supra*). Equity relaxes these rules, and goes beyond the law, only when the departure is necessary "to prevent wrong and injustice" (*North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co.*, 152 U. S. 596, 615; *Gray v. Rollo*, 18 Wall. 629; *Scott v. Armstrong*, 146 U. S. 499, 507; *Goodwin v. Keney*, 49 Conn. 563, 569). Here, in this record, is no case of wrong and injustice triumphant if a set-off be refused. Attorneys have by their labor produced a judgment. They have done so in reliance upon the assurance of the statute that the judgment, and the cause of action back of it, shall secure their pay. The debtors seek by the belated purchase of another judgment to frustrate the hope and belie-

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the promise. Nothing that will move discretion to a departure from the rules of set-off as they prevail in courts of law, will be found in that endeavor.

The judgment should be affirmed with costs.

HISCOCK, Ch. J., HOGAN, POUND, McLAUGHLIN, ANDREWS and ELKUS, JJ., concur.

Judgment affirmed.

TEREZ KRETIK, as Administratrix of the Estate of GEORGE KRETIK, Deceased, Respondent, *v.* THE NEW YORK CENTRAL RAILROAD COMPANY, Appellant.

Railroads — negligence — injury to person lying upon track — engineer of moving train bound to use reasonable care, only, to see such person.

Where an object, which afterward turned out to be the plaintiff's intestate, was lying between the tracks of defendant's railroad at a street crossing, as a train was approaching, and was struck by the train, and there is no evidence to show how or why decedent was there, and the engineer of the train testified that, although he was looking out of his front cab window, he did not see decedent and could not have seen him, owing to a curve in the track, unless he had leaned out of the cab window to look, it was error for the trial court to submit to the jury the question whether the engineer ought to have seen the decedent in the exercise of due care. There was no such duty unless he had reason to believe that some person was there and he had basis for such belief unless the object was already visible; the engineer in the exercise of due care was not bound, under the particular circumstances in this case, to lean over and put his head out of the cab window in order to have seen the decedent.

Kretik v. N. Y. Central R. R. Co., 187 App. Div. 922, reversed.

(Argued November 26, 1919; decided January 6, 1920.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered February 1, 1919, affirming a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

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Henry Purcell for appellant. The defendant was not guilty of willful or other negligence. (*Bragg v. Central N. E. R. R. Co.*, 160 App. Div. 603; *Sutton v. N. Y. Central R. R. Co.*, 66 N. Y. 243; *Chrystal v. Troy & Boston R. R. Co.*, 105 N. Y. 164; *O'Brien v. Erie R. R. Co.*, 210 N. Y. 96; *Feeck v. N. Y. C. R. R. Co.*, 180 App. Div. 253; *Phealan v. Rae*, 101 Misc. Rep. 424.)

Alfonse F. Spiegel and *Harry Flaum* for respondent. The case is replete with evidence of defendant's negligence and it was correctly submitted to the jury. (*Foley v. N. Y. Central R. R. Co.*, 197 N. Y. 430; *Salter v. Utica R. R. Co.*, 59 N. Y. 631; *Powell v. N. Y. C. R. R. Co.*, 22 Hun, 56; *G. T. R. R. Co. v. Ives*, 144 U. S. 408; *Bradley v. Degnon Cont. Co.*, 224 N. Y. 60; *Deering v. N. Y. C. R. R. Co.*, 22 N. Y. Supp. 344; *Hamilton v. Erie R. R. Co.*, 219 N. Y. 343; *McCaffery v. D. & H. Canal Co.*, 16 N. Y. Supp. 495; 137 N. Y. 568; *Waldele v. N. Y. C. R. R. Co.*, 19 Hun, 69; *Rider v. Syracuse Ry. Co.*, 171 N. Y. 139.)

ELKUS, J. Plaintiff's intestate, George Kretik, 41 years of age, received injuries, resulting in his death, on January 10, 1917, between ten and eleven o'clock in the forenoon, by being struck by a locomotive operated by the defendant which was attached to a milk train, on defendant's tracks near where Jackson street was intersected by the defendant's railroad, at Lowville, Lewis county, New York. The day was cold and it was snowing.

Jackson street is a much-used and well-paved commercial thoroughfare. The crossing is at grade and is unprotected and unguarded. There are no flagmen, gates or bars to safeguard the public in crossing the tracks. There are sidewalks on Jackson street on both sides of the roadbed, interrupted by the tracks. The decedent was first seen just before the accident, walking back and forth on the north sidewalk of Jackson street,

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a short distance from the tracks. An object, which afterwards turned out to be the decedent, was seen, shortly before the decedent was struck, lying on the railroad bed near to what would be the continued line of the south sidewalk of Jackson street, across the six-foot space between the main and side tracks. A few minutes after the decedent was first seen in this position, the train approached. The engineer stopped the train when he saw the decedent's body roll from the track after having been struck by the engine. Decedent died as the result of the injuries.

The plaintiff claims that the train approached without blowing a whistle or sounding a bell, which is denied by the engineer and fireman operating the engine, who claim that whistle was blown and bell sounded. The plaintiff's witnesses testified that the train was running about five miles an hour, and the defendant's witnesses, the engineer and brakeman, testified it was running between ten and fifteen miles an hour. The engineer testified he was looking out of his front cab window, but did not see the plaintiff's intestate; that he could not see him unless he looked out of the side cab window and leaned over to do so; that he had his hand on a part of the machinery, not the throttle as the steam was shut off; that it was necessary for him to do this, but the part of the machinery upon which he had his hand was not stated nor the necessity for it.

There was no evidence introduced to explain why the plaintiff's intestate was lying upon the track. It was surmised that he was taken ill or had fainted or had fallen there. The plaintiff's claim is that the defendant's engineer, exercising due care, ought to have seen the man lying near the track and ought to have stopped his train before striking him. The defendant claims there was a curve in the track and by reason of that curve it was impossible for the engineer, sitting on his seat on the right side of the cab and looking straight ahead, to see

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the plaintiff's intestate lying by the track. One of the plaintiff's witnesses testified that he could see down the track from Jackson street toward the direction in which the train was coming about six or seven hundred feet, but there was no evidence in the case as to how far an engineer, sitting in his engine, could see and whether or not an engineer could see a person lying between the tracks where the plaintiff's intestate was. The view of one standing up and looking along a curve of a railroad at an object six or seven hundred feet away would be entirely different from that of one sitting in an engine or at the height of an engine, looking along the railroad track at the same distance, especially when a curve existed in the track. The defendant's engineer testified that the front part of his engine, the boiler, extended out so far that it interfered with his view, and that because of the curve he could not see the point of intersection of Jackson street and the track, and, therefore, was unable to see the man on the ground near the track by looking out of the front window.

The court submitted to the jury, as a critical question in the case, whether the engineer, in the exercise of due care, ought to have seen the decedent. The engineer testified, however, that he did not and could not see the plaintiff's intestate and, though the jury would not be bound by his testimony, if there had been any direct testimony to the contrary or even any testimony from which a different inference could have been drawn, we find none in this record. We cannot agree with the trial court that it was a question for the jury whether, when approaching a crossing, the engineer ought to have leaned out of the cab window in order to see if any person was lying on or near the tracks. There was no such duty unless he had reason to believe that some person was there. He had no such reason unless the object was already visible.

The engineer was bound to exercise only reasonable

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care in the management of the train. (*Chrystal v. Troy & B. Railroad Co.*, 105 N. Y. 164.) He has the right in broad daylight, when his train is perfectly visible, and its approach must be heard and known, at least in the first instance, to assume that a person will leave the track to escape injury. Reasonable care in the management of trains, which have the right of way, does not require more. (*O'Brien v. Erie Railroad Co.*, 210 N. Y. 96.)

The evidence produced is insufficient upon a reasonable view to sustain the verdict appealed from. The question in the case is whether the engineer in the exercise of due care ought to have seen the decedent, but the engineer was not bound, under the particular circumstances of this case, to lean over and put his head out of the cab window to do this. (*O'Brien v. Erie Railroad Co.*, 210 N. Y. 96.)

There was failure to prove many matters which may be susceptible of proof, some of which have been indicated. These may be supplied upon a new trial. I believe the ends of justice will be best served by granting a new trial.

The judgment and order appealed from should be reversed and a new trial ordered, with costs to the appellant to abide the event.

HISCOCK, Ch. J., COLLIN, HOGAN, CARDOZO, POUND and McLAUGHLIN, JJ., concur.

Judgments reversed, etc.

VICTORIA KONNER, Appellant, *v.* THE STATE OF NEW YORK, Respondent.

Highway Law — Court of Claims — unlawful and unauthorized taking of land for highway improvement by contractor before lawful appropriation thereof by state — state not liable therefor — erroneous award by Court of Claims.

1. The Highway Law (Cons. Laws, ch. 25, § 148, prior to amendment by L. 1917, ch. 261) provided that whenever a state or county highway, proposed to be constructed or improved under such law, should

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deviate from the line of a highway already existing, the board of supervisors of the county where such highway was located should acquire land for the requisite right of way prior to the actual commencement of the work of construction. Where in a contract made by the state for the construction of a highway the contractor expressly agreed to conform with the provision of the statute, but, before a strip of land required for widening the highway had been acquired by the board of supervisors of the county, or otherwise, entered upon the land and made excavations for widening the highway, he was a trespasser thereon in violation of his contract with the state and the statute which was in substance made a part of the contract. Hence the owner of the land has no claim against the state and the determination of the Court of Claims awarding her damages is erroneous.

2. Evidence that the highway engineer, in charge of the work, had staked out the lines of the highway to be improved in accordance with the plans and had directed the contractor to make excavations in accordance with the stakes set out by him, falls short of a direction to make such excavations before title to the property, on which the excavations were to be made, was acquired, and such evidence is insufficient to support a finding of the Court of Claims that "The work was being done by a contractor for and with the state, in conformity with plans, specifications, direction, control and instructions of the state, and the operations of said contractor hereinafter referred to were in conformity therewith and pursuant thereto."

Konner v. State of New York, 180 App. Div. S37, affirmed.

(Argued November 19, 1919; decided January 6, 1920.)

APPEAL from a judgment, entered March 5, 1915, upon an order of the Appellate Division of the Supreme Court in the third judicial department, reversing a judgment in favor of plaintiff entered upon an award of the Court of Claims and directing a dismissal of the claim.

The facts, so far as material, are stated in the opinion.

Joseph Rosch and *Harry M. Beck* for appellant. The sections of the Code creating the Court of Claims gave that court sufficient authority to hear and determine this

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claim and was sufficient authority by the state to the Court of Claims to award the damages herein. (*Quayle v. State*, 192 N. Y. 47; *Arnold v. State*, 163 App. Div. 253; *Bowen v. State*, 108 N. Y. 166; *Burke v. State*, 64 Misc. Rep. 558; *Remington v. State*, 116 App. Div. 522; *Ballou v. State*, 111 N. Y. 496; *Woodman v. State*, 127 N. Y. 397; *Sipple v. State*, 99 N. Y. 284; *Herkimer Lumber Co. v. State*, 73 Misc. Rep. 501; *Coster v. Mayor, etc.*, 43 N. Y. 399.) There was statutory authority for the state through its agents to go upon the land of the claimant and dig. (L. 1909, ch. 30, §§ 15, 120, 125, 127, 130, 132.) The case at bar was not merely one of change of grade but involved an encroachment upon the property of the claimant. (*Huffmire v. City of Brooklyn*, 162 N. Y. 584; *Carll v. Northport*, 11 App. Div. 120; *Moore v. City of Albany*, 98 N. Y. 396; *Smith v. Helmer*, 7 Barb. 416; *Chapman v. Gates*, 54 N. Y. 132; *People v. Adirondack R. R. Co.*, 160 N. Y. 225.)

Charles D. Newton, Attorney-General (Jerome L. Cheney and B. F. Sturgis of counsel), for respondent. The state is not liable for an unlawful trespass committed by its officers. (*Saranac L. & T. Co. v. Roberts*, 125 App. Div. 333; 195 N. Y. 303; *Litchfield v. Bond*, 186 N. Y. 66; *Robinson v. Chamberlain*, 34 N. Y. 389; *Williams v. Riverburg*, 145 App. Div. 93.)

CHASE, J. In the year 1912 the claimant was the owner of a small tract of land in the village of Parksville, in the county of Sullivan. It was situated on the easterly side of a public highway. The surface of the ground sloped upward from the highway for a distance of eighty-five feet at an angle of about forty-five degrees. On such tract of land beyond such abrupt slope the claimant had a house and barn. The Court of Claims found that "There was a dry stone retaining wall about three feet in height along the base of said hill and claimant's

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premises separated from the travelled portion of the highway by the usual shallow highway ditch." It further found:

"4. In the month of August or September, 1912, the construction of State Highway No. 5223, Route No. 4, was proceeding on the general site of the former highway in front of claimant's premises. * * *

"5. That in the doing of said work said contractor then and there removed said dry stone retaining wall at the base of claimant's premises and with a steam shovel or otherwise excavated into the earth in the rear of said wall a distance of between 4 and 12 feet and upon and into the premises of claimant and trespassed thereon in so doing in order to widen the improved road at that point. * * *

"6. That, thereafter, and at about the end of April or the first part of May, 1913, when the frost was thawing from the soil, the greater portion of the said hill and the premises of the claimant, slid from its place down over the site of the retaining wall, and of the excavation made by the State's contractor and upon and over the highway into the brook.

"7. That said removal of said dry stone wall and the excavation made by said contractor in the rear thereof, were negligently and carelessly done, and the omission to furnish protection and support for claimant's land was negligence of the State, and that said operations of the State and its contractor were done and performed without claimant's consent, upon the premises of the claimant, and caused the slide of the claimant's land and the injuries thereto."

The court further found that as a result of the slide claimant was damaged to the amount of \$2,200. The claimant filed a notice of intention to file a claim against the state as required by section 264 of the Code of Civil Procedure. Such notice alleged that she was damaged

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as the result of the carelessness and negligence of the state in the construction of said highway which "passes alongside the premises of the claimant."

The claim subsequently filed by her is in substantial accord with the notice of intention to present a claim. At the commencement of the trial in the Court of Claims she moved to amend *the claim* filed by her by inserting therein certain words to include a claim for "trespass and unlawful entry" upon her property and a further general allegation as follows:

"That on or about the first day of May, 1913, prior as well as subsequent thereto the said State of New York through its officers and agents unlawfully entered into and upon said premises and excavated the retaining wall and portion of the front yard and approaches of said premises and the land in front of same and destroyed the same by its wrongful acts."

The claim was amended accordingly. The court found as a conclusion of law: "That the state was guilty of a trespass upon the premises of the claimant and was negligent in the performance of the work aforesaid and in the plans and directions therefor. * * *."

Judgment was entered upon the award of the Court of Claims. An appeal was taken to the Appellate Division where by a divided court the judgment was reversed and the claim dismissed. (*Konner v. State of New York*, 180 App. Div. 837.)

We do not in this opinion discuss the question considered by the Appellate Division herein relating to the claimant's notice of intention to file a claim, the claim filed by her and the amendment thereto because we have reached the conclusion that there is no statute which will permit the claimant to recover *as against the state* on the facts as shown by the record either on her claim as originally filed or as amended.

The highway which ran along the westerly side of the claimant's property was a part of "route 4" as described

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in section 120 of the Highway Law (Consolidated Laws, chapter 25) to be improved at the sole expense of the state. The commissioner of highways determined upon the construction of that highway including the part thereof in front of claimant's property and the surveys, maps, plans and specifications were prepared accordingly. They provided for a deviation from the line of the existing highway which resulted in the necessity of acquiring a strip of the claimant's property at the foot of the hill next to the existing highway.

Such maps, plans and specifications were adopted as provided by statute and a contract was entered into for the construction of such highway. It appears from a map in evidence that the state by its plans proposed to take and occupy a strip of the claimant's land along the highway, triangular in form running from a point at the northwesterly corner thereof adjoining the highway, to a width of 16.4 feet at the southwesterly corner of her property adjoining the highway, it being a strip of land about one hundred and forty-five feet long. The map showing the strip to be acquired is indorsed: "State of New York, Department of Highways. Land to be acquired for the Liberty-County Line Pt. #1 State Highway Route No. 4, Sullivan County, section No. 12 From M. Kannan, (Reputed owner.)"

The Highway Law, section 148, as it existed prior to the amendment by chapter 261, Laws of 1917, provided:

"If a state or county highway, proposed to be constructed or improved as provided by this article, shall deviate from the line of a highway already existing, the board of supervisors of the county where such highway is located, shall acquire land for the requisite right of way prior to the actual commencement of the work of construction. * * * "

It is conceded that neither the proposed triangular strip of land nor any part of the lands of the claimant was acquired by the board of supervisors of the county

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or otherwise. It is also substantially conceded that the contractor without waiting for the board of supervisors to acquire said lands of the claimant took possession of a strip of land owned by the claimant adjoining such highway, whether exactly conforming to the lands so proposed to be taken does not clearly appear, and excavated the same as found by the Court of Claims.

The contract made by the state for the building of said road expressly provided that "The contractor further agrees to conform with the provisions of chapter 30 of the Laws of 1909 (Consolidated Laws, chapter 25) and the amendments thereto." The contractor, therefore, in trespassing upon claimant's property and excavating the same prior to title thereto having been acquired by the board of supervisors did so in violation of his contract with the state and the statute which was in substance made a part of such contract. Such trespass was not only committed without the authority of the state but contrary to its express command. It was a trespass by the contractor and not by the state.

The proposed taking of such lands of the claimant was not unlawful. Before entering thereon for the purpose of constructing the highway, such lands should have been acquired by agreement or condemnation as provided by statute. The facts found and practically conceded as stated above, absolve the state from any claim for the trespass of the contractor.

It is urged, however, that the state is responsible for the trespass of the contractor because of the acts and statements of the engineer who was employed by the state as also provided by the statute. The Court of Claims, referring to the work done by the contractor, found: "The work was being done by a contractor for and with the state, in conformity with plans, specifications, direction, control and instructions of the state, and the operations of said contractor hereinafter referred to were in conformity therewith and pursuant thereto."

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The only evidence on which to base this finding is that the engineer staked out the lines of the highway to be improved in accordance with the plans and directed the contractor to make the excavations in accordance with the stakes set by him. This evidence falls far short of a direction to the contractor to make such excavations before title to the property on which the excavations were to be made is acquired. The direction of the engineer as stated is wholly insufficient on which to base the finding of fact. Even if the engineer had directed the contractor to proceed with the excavations before title to claimant's property had been acquired, knowing that the same would be a trespass on the plaintiff's property, his direction without authority from the state and contrary to the express provision of the statute would not be binding upon the state. (*Litchfield v. Bond*, 186 N. Y. 66; *Kansas v. Colorado*, 185 U. S. 125; *Smith v. State*, 227 N. Y. 405; *Saratoga State Waters Corp. v. Pratt*, 227 N. Y. 429.)

If the engineer gave specific direction to commit the trespass he as well as the contractor who committed the trespass was personally liable therefor. It would appear from the record that the state highway as occupied and used includes a part of claimant's property. Such part of her property so included within the bounds of the highway as improved, we assume has now been permanently appropriated by the state for highway purposes. She has a meritorious claim for the wrongful appropriation of her property and the consequential damages resulting from such taking. Although we cannot sustain her claim as presented, if there is in fact a permanent appropriation of some part of her property she is not remediless apart from her remedy against the trespassers and in any event we cannot believe that either the county or the state will omit pursuant to further remedial legislation or otherwise to determine and pay reasonable compensation to her for her damages so far at least as they have been

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occasioned by necessary or reasonable acts in carrying out the plan adopted by the state for its highway.

The judgment of the Appellate Division should be affirmed, with costs.

HISCOCK, Ch. J., CARDODOZ, POUND, McLAUGHLIN and ANDREWS, JJ., concur; CRANE, J., dissents.

Judgment affirmed.

FLORENCE ROLFE, as Administratrix of the Estate of EDMUND ROLFE, Respondent, *v.* JOSEPH F. HEWITT, Appellant.

Master and servant — negligence — when master not liable for injuries to person riding in automobile with chauffeur without knowledge or permission of owner — when such person, whether riding by invitation or by permission of chauffeur, not licensee of owner for whose safety he was responsible — erroneous instructions to jury.

1. Where defendant, who had previously instructed his chauffeur not to permit another person to ride in the car, unless defendant gave express permission to that effect or was himself in the automobile at the time; and thereafter the chauffeur was directed by defendant to go to a village after some building materials, and plaintiff's intestate, a contractor working for defendant, without defendant's knowledge, got into the car, but whether with the permission or against the objection and protest of the chauffeur does not appear, and rode with him to the village and assisted in procuring the materials for which the chauffeur had been sent, and again got in the car to return, and on the way back the car was overturned, the chauffeur killed and plaintiff's intestate injured so that he died shortly thereafter, the plaintiff cannot recover.

2. Where in such case the trial judge submitted the case to the jury with instructions that, if they found that the accident was caused by the negligence of the chauffeur, plaintiff could recover, (a) if the intestate was a licensee, in the car by permission of the chauffeur, the defendant, through his chauffeur, owed him ordinary care not to increase the danger while there riding or to create a new danger, or (b) if the intestate was a trespasser, that is, had forced his way in the car without the permission of the chauffeur, that the chauffeur would not be justified in wantonly or willfully injuring him, and if he did,

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then they might find the defendant liable. *Held*, error, and that the judgment must be reversed for two reasons: *First*, because there is absolutely no evidence in the record which would justify a finding that the chauffeur wantonly or willfully injured the intestate or caused his death, and the jury should have been so instructed. *Second*, the record does not disclose any evidence that the intestate was in the car at the time of the accident with the consent, permission or knowledge of defendant, and as to him he was not a licensee. If he were in the car with the consent of the chauffeur, then as to him he was a licensee, but not as to the defendant. The chauffeur in permitting him to ride was not acting within the scope of his employment or doing anything to further the defendant's interests. (*Grimshaw v. Lake Shore & M. S. Ry. Co.*, 205 N. Y. 371, distinguished.)

Rolfe v. Hewitt, 184 App. Div. 920, reversed.

(Argued November 20, 1919; decided January 6, 1920.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered May 20, 1918, affirming a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

Andrew J. Nellis and James B. Henney for appellant. There was neither pleading nor evidence to justify a recovery. The *respondeat superior* rule is inapplicable. (*Haskell v. L. H. & P. Co.*, 209 N. Y. 91; *Southwick v. Bank*, 84 N. Y. 429; *Stewart v. Sulger*, 174 App. Div. 841; *Massaletti v. Fitzroy*, 228 Mass. 487; *Lowell v. Williams*, 183 App. Div. 701; *Morris v. Brown*, 111 N. Y. 330; *Stensler v. Gas Light Co.*, 179 App. Div. 774; 226 N. Y. 125; *Kennedy v. R. & L. Co.*, 224 Mass. 207; *Walker v. Fuller*, 223 Mass. 566; *Scott v. Peabody*, 153 Ill. App. 103; *Walker v. Coal Co.*, 144 Ga. 695; *Hume v. Elder*, 178 App. Div. 652.) The court erred in charging that the chauffeur might be found to have willfully and wantonly injured intestate, and in refusing to charge no facts were proved from which willfulness and wantonness could be inferred. (*Duree Case*, 241 Fed. Rep. 456.)

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William H. Hamilton and Norman C. Conklin for respondent. The plaintiff was entitled to recover on the theory that Rolfe was a licensee or invitee. (*McHarg v. Adt*, 221 N. Y. 510; *Phila. & R. Ry. Co. v. Derby*, 14 How. [U. S.] 468; *Grimshaw v. Lake Shore & M. S. R. R.*, 205 N. Y. 371; 140 App. Div. 688; *Harris v. Perry Co.*, 1903, 2 K. B. 219; *Perkins v. Galloway*, L. R. A. 1916 E. 1190; 73 So. Rep. 956; *Steamboat New World v. King*, 16 How. [U. S.] 467; *Adams v. Tozier*, 163 App. Div. 751; *Patnode v. Foote*, 153 App. Div. 494; *Royal Indemnity Co. v. P. & W. Refining Co.*, 98 Misc. Rep. 631; *Stern v. International Ry. Co.*, 167 App. Div. 503; 220 N. Y. 284; *Beard v. Klusmeier*, 158 Ky. 153; *Fitzjarrell v. Boyd*, 91 Atl. Rep. 547; *Huddy on Automobiles*, § 113; *Geibel v. Elwell*, 19 App. Div. 285.) There was no error in the submission of the case to the jury. (*Rounds v. D., L. & W. R. R. Co.*, 64 N. Y. 129; *Johnson v. Coey*, 237 Ill. 88; *Stern v. International Ry. Co.*, 167 App. Div. 503; 220 N. Y. 284; *Countryman v. Fonda, J. & G. R. R.*, 166 N. Y. 201; *Kelly v. Willis*, 116 App. Div. 756; *McCahill v. N. Y. Transportation Co.*, 201 N. Y. 221; *Du Bois v. Decker*, 130 N. Y. 325; *P. & R. Ry. Co. v. Derby*, 14 How. [U. S.] 468; *Grimshaw v. Lake Shore R. R.*, 205 N. Y. 371; *Harris v. Perry & Co.*, 1903, 2 K. B. 219; *Steamboat New World v. King*, 16 How. [U. S.] 467; *McHarg v. Adt*, 221 N. Y. 510.) The rule of *respondeat superior* applies. (*Lowell v. Frank*, 183 App. Div. 701; *Perkins v. Galloway*, L. R. A. 1916 E. 1190; *Scott v. Latting*, 140 N. W. Rep. 186; *McHarg v. Adt*, 221 N. Y. 510.)

McLAUGHLIN, J. On the 30th of March, 1917, plaintiff's intestate was killed by the overturning of an automobile in which he was riding. The automobile was owned by the defendant and at the time of the accident was being driven by his chauffeur on the highway between Bearsville and Woodstock, in the county of Ulster, N. Y. This action was brought to recover damages by

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reason of his death, alleged to have been caused by the negligence of defendant's chauffeur. Plaintiff had a verdict, upon which judgment was entered, and an appeal taken to the Appellate Division, third department, which resulted in an affirmance, by divided court, and defendant appeals to this court.

The defendant was erecting a bungalow near Woodstock, through one Niernsee, as contractor, and one Lithgow, as superintendent of construction. Shortly after eleven o'clock on the morning of the day named, defendant directed his chauffeur to drive to Bearsville or Woodstock to get certain materials, a list of which Lithgow had made and which were needed in the construction of the bungalow, and to be back by one o'clock. The intestate had a contract to do certain work on the bungalow, and which on the day named he had substantially completed. After the list of materials wanted had been made by Lithgow, the intestate took the same and gave it to the chauffeur. Shortly thereafter Lithgow and the defendant went to the chauffeur, who was with defendant's automobile a short distance from the bungalow, and told him they wanted, in addition to what was on the list, twenty-five pounds of shingle nails, and defendant then gave him the money to pay for the materials desired. Where the intestate was at this time does not appear. The chauffeur had previously been instructed by defendant not, under any circumstances, to permit another person to ride in the car, unless defendant gave express permission to that effect, or was, himself, in the automobile at the time. After receiving the list of materials wanted, the chauffeur started with the car to get them. Sometime thereafter plaintiff's intestate got into the car — just when or where does not appear — nor does it appear whether it were with the permission or against the objection and protest of the chauffeur. It does appear, however, that he was in the car when it passed through Woodstock and when it reached Bearsville. On

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reaching Bearsville he took from the chauffeur the list of the materials wanted and the money which had been given to the chauffeur by defendant, went into the store and made the purchases, and returned with the materials to the car, again getting into it. On the return from Bearsville the chauffeur apparently lost control of the car and the same left the highway, killing him and injuring the intestate so that he died shortly thereafter.

The learned trial justice submitted the case to the jury with instructions that if they found the accident was caused by the negligence of the chauffeur, they might find a verdict in favor of the plaintiff upon either one of two theories: (a) That the intestate was a licensee, that is, that he was in the car by permission of the chauffeur, in which case defendant, through his chauffeur, owed him ordinary care not to increase the danger while there riding, or to create a new danger; or (b) that he was a trespasser, that is, that he had forced his way into the car without permission of the chauffeur, but in that case the chauffeur would not be justified in wantonly or willfully injuring him, and if he did, then they might find defendant liable. Exception was taken to the instruction that the jury might find defendant liable if the chauffeur willfully and wantonly injured the intestate, and the court was asked to charge that there was no evidence which would justify a finding to that effect, which was refused, and an exception also taken.

I am of the opinion that the judgment must be reversed for two reasons: *First*, because there is absolutely no evidence in the record which would justify a finding that the chauffeur wantonly or willfully injured the intestate or caused his death, and the jury should have been so instructed. *Second*, the record does not disclose any evidence that the intestate was in the car at the time of the accident with the consent, permission or knowledge of defendant, and as to him he was not a licensee. If he were in the car with the consent of the chauffeur, then

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as to him he was a licensee, but not as to the defendant. The chauffeur, in permitting him to ride, was not acting within the scope of his employment or doing anything to further the defendant's interests. (*Mott v. Consumers' Ice Co.*, 73 N. Y. 543.)

The rule is well settled that an agent binds his master only as to acts done within his actual authority, or within the apparent scope thereof. (*Timpson v. Allen*, 149 N. Y. 513, 519; *Edwards v. Dooley*, 120 N. Y. 540, 551.) A servant is acting within the scope of his employment when he is engaged in doing for his master what he has been directed to do, or as Mecham on Agency (Vol. 2, sec. 1875) says: "Any act which can fairly and reasonably be deemed to be an ordinary and natural incident or attribute of that act, or a natural, direct and logical result of it." The chauffeur had been directed to do a specific thing. He needed no assistance in doing that act, and if the intestate got into the car at his invitation, or with his permission, he was not acting within the scope of his authority, but contrary to express orders theretofore given. (*Rose v. Balfe*, 223 N. Y. 481.) When the owner of a private car sends his chauffeur on an errand, that does not give him authority to take into it a person casually met upon the highway. (*Eaton v. D., L. & W. R. R. Co.*, 57 N. Y. 382; *Morris v. Brown*, 111 N. Y. 318; *Finley v. Hudson El. Ry. Co.*, 64 Hun, 373; affd., on opinion below, 146 N. Y. 369; *Raible v. Hygienic Ice & Refrigerating Co.*, 134 App. Div. 705.)

In the *Eaton* case plaintiff was invited by the conductor of a coal train upon defendant's road to ride in the caboose, the conductor promising to get him employment as a brakeman. While so riding, plaintiff was injured through the negligence of defendant's employees. The court held defendant was not liable, stating that plaintiff could only be lawfully on the train by an authorized act of the conductor.

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In the *Morris* case defendants were engaged in excavating for a tunnel. Plaintiff's intestate, a civil engineer, while riding on a dump car which ran on a track in and out of a tunnel, was thrown from the car and killed, due to the negligence of the brakeman in charge of the car. These cars were not intended as facilities for taking persons in and out of the tunnel, but it appeared that the intestate had been accustomed, with the consent of the brakeman, to ride upon it, though it did not appear this had been with the knowledge of the defendants, nor that the brakeman had any authority to give his consent. This court held that the trial judge erred in submitting the case to the jury and took occasion to point out that the knowledge of the brakeman that plaintiff's intestate had been riding on the car on previous occasions, and the permission of the brakeman, did not bind the defendants; and that the brakeman was not their agent for that purpose.

In the *Finley* case the plaintiff, a boy, was invited by the motorman to ride upon a car in payment for his services in opening a switch which it was the duty of the motorman to open. It was held that the motorman, in extending the invitation, was not acting within the line of his duty or doing it in furtherance of defendant's interest or for its benefit, the court saying: "Not only is it not within the scope of his employment to invite people to ride free, or to employ others to assist him in the performance of his duties and compensate them by free transportation, but in this particular case the defendant * * * had ordered their motorman not to permit or allow it, and had made rules against it." (p. 374.)

In the *Raible* case defendant's stableman, who had no authority to employ assistants, called plaintiff, a boy fifteen years of age, to lead a horse to a watering trough, although there was no emergency which rendered such assistance necessary. The boy was kicked by the horse,

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while returning from the trough, and it was held that the act of the stableman in permitting the plaintiff to lead the horse was a delegation of his personal duty and the substitution of another in his place, which was clearly beyond the scope of his authority and unauthorized by defendant.

There are numerous authorities to the same effect. Thus, in *Walker v. Fuller* (223 Mass. 566) plaintiff was injured while riding in an automobile driven by one Woods, an employee of the defendant. The plaintiff was also in defendant's employ, but had finished his work for the day and while waiting to take a street car saw Woods drive out of the defendant's yard. He asked him if he were going to town and when the latter replied that he was, he got into the automobile and was injured by reason of the negligence of the driver. It was held that defendant was not liable; that plaintiff was not being carried in the automobile at the time he was injured by reason of any invitation of defendant, or any one in his employ who was authorized by him to extend such an invitation. (See, also, *Driscoll v. Scanlon*, 165 Mass. 348; *McQueen v. People's Store Co.*, 97 Wash. 387; *Scott v. Peabody Coal Co.*, 153 Ill. App. 103; *Flower v. Pennsylvania R. R. Co.*, 69 Penn. St. 210; *Dover v. Mayes Mfg. Co.*, 157 N. C. 324; *Schulwitz v. Delta Lumber Co.*, 126 Mich. 559; *Kiernan v. New Jersey Ice Co.*, 74 N. J. L. 175; *Hoar v. Maine Central R. R. Co.*, 70 Me. 65; *Dougherty v. Chicago, Milwaukee & St. Paul Ry. Co.*, 137 Ia. 257; *Hall v. Missouri Pacific Ry. Co.*, 219 Mo. 553; *Central Stamping Co. v. Mc Keon*, 255 Fed. Rep. 8; *Duree v. Wabash R. Co.*, 241 Fed. Rep. 454; *Lygo v. Newbold*, 9 Exch. 302 [1854]; Lord Halsbury's Laws of England, vol. 20, p. 255.)

But it is urged by the attorney for the respondent that *Grimshaw v. Lake Shore & Michigan Southern Ry. Co.* (205 N. Y. 371) is an authority for the maintenance of this action. I do not think so. The rule there laid

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down is not applicable to the facts of this case, as a brief consideration of what was there decided will show. The decision in no way involved the doctrine of *respondeat superior*. Plaintiff's intestate worked in the master mechanic's office of the Erie railroad at Buffalo. He had been there employed for several weeks, and with others had been in the habit of riding on a Wabash engine to and from his work, a distance of two and a half or three miles. At the time of the accident he, with several others, was on this engine, which was against the rules of the Wabash Company. At an intersection of the tracks of the Erie and Lake Shore and Michigan Southern railroads, the Wabash engine was struck by a Lake Shore train, due to the negligence of the switchman of the latter road, resulting in the intestate's death. He sustained no relation whatever to the Lake Shore road, and the sole question decided was whether that road was liable by reason of the negligence of its switchman. The status of the intestate on the Wabash engine at the time of the collision was not involved in the decision and in fact was immaterial to the question tried. This is not only apparent from the charge of the trial judge, but also from the opinion delivered in this court. Judge BARTLETT said: "Further than that, the status of the injured person toward the corporation on whose locomotive he was riding was immaterial to the company operating the train which caused the injury." (p. 377.) It is true there are expressions in the opinion to the effect that he was either a licensee or a trespasser, and if the former, the defendant, if negligent, would be liable, but if the latter, not. He was, as to the defendant, neither one nor the other and such expressions and what was said in the opinion on that subject were unnecessary and in no way involved in the decision. A judicial opinion, like a judgment, must be read as applicable only to the facts involved and is an authority only for what is actually decided.

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The judgments of the Appellate Division and Trial Term should, therefore, be reversed, and new trial granted, with costs to abide event.

HISCOCK, Ch. J., CHASE and ANDREWS, JJ., concur; CARDODOZ, POUND and CRANE, JJ., concur in result in memorandum as follows: CARDODOZ, POUND and CRANE, JJ., are of the opinion that the evidence would justify the submission to the jury of the question whether the decedent was in the car as the licensee of the defendant, but concur in the view that the defendant is not liable to one who was merely the licensee of his chauffeur, and that the judgment cannot be sustained upon the theory of the trial.

Judgments reversed, etc.

AMANDA TILLMAN, Individually and as Administratrix with the Will Annexed of the Estate of ANNA C. ERICKSON, Deceased, Appellant, *v.* CHARLES A. OGREN, as Executor of LARS ERICKSON, Deceased, Respondent.

Will — testamentary gift — absolute gift followed by repugnant gift to another — when such absolute gift not modified or qualified by subsequent provision.

1. A gift to one followed by a gift to another of such part thereof as may remain at the decease of the first taker, can be enforced when the intention of the giver is clear and definite to limit the gift to the first taker to a life estate with power to dispose of the principal or any part thereof during his lifetime and to give to another such part of the principal as is not disposed of in the lifetime of the first taker. The gift over after a gift that is apparently absolute is sustained because it is ascertained that it was not the giver's intention to make an absolute gift, but one qualified and limited by the subsequent or other provisions of the will or instrument creating the gifts. The common-law rule governing repugnant gifts has been changed by statute (Real Property Law [Cons. Laws, ch. 50], § 57; Personal Property Law [Cons. Laws, ch. 41], § 11).

2. Where there is an absolute gift of real or personal property, in order to qualify it or cut it down the latter part of the will should show equally clear intention to do so by use of words definite in the meaning

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and by expressions which must be regarded as imperative, and where a wife gave all of her residuary estate to her husband, his heirs and assigns forever, "with the understanding" that at his decease all of the estate which he should derive under her will and then undisposed of should be given and turned over to the sister of testatrix, such provision constituted a clear, certain, unqualified and absolute gift to the husband; the statement that such gift was given "with the understanding" that the husband should give any part of the residuary estate not disposed of by him to testatrix' sister does not import a contract already made or arising from an acceptance by her husband of the bequest and devise. The gift to the husband was absolute and there was no gift to the sister.

Tillman v. Ogren, 182 App. Div. 672, affirmed.

(Argued November 21, 1919; decided January 6, 1920.)

APPEAL from a judgment, entered October 11, 1918, upon an order of the Appellate Division of the Supreme Court in the first judicial department, affirming a judgment entered upon a decision of the court on trial at Special Term in so far as the same was appealed from by the plaintiff and reversing said judgment in so far as the same was appealed from by the defendant and directing a dismissal of the complaint.

In 1903 Lars Erickson and his wife, Anna C. Erickson, lived in Brooklyn. Mrs. Erickson owned a building at 522 Classon avenue in a part of which she lived with her husband. On January 17, 1903, she made her will and on March 27, 1903, she died. By her will she made her husband executor and gave her sister Amanda Tillman, \$1,000. She then provided:

"Fourth. I give and bequeath to my beloved husband Lars Erickson all of the rest and remainder of my estate both real and personal to have and to hold the same to him, his heirs and assigns forever, with the understanding that at the decease of the said Lars Erickson all of the estate which he shall derive under this will which shall then remain by him undisposed of he shall give and turn over to my sister Amanda Tillman."

Her will was duly probated and letters testamentary

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were issued to Lars Erickson. The decision in this case contains findings of fact, among which are the following:

“ 3. That the entire estate, both real and personal, of which said Anna C. Erickson died seized or possessed, consisted of the following:

“ Real Estate: Number 522 Classon Avenue, Borough of Brooklyn, City of New York.

“ Personal estate: Amount on deposit in Kings County Trust Company, \$4,500.

“ 5. That under said decree (in proceeding on petition of Lars Erickson) the Surrogate’s Court of Kings County in judicially settling and allowing the account of said Lars Erickson as executor of the estate of Anna C. Erickson, directed to be turned over to him, Lars Erickson, the sum of Three thousand one hundred and fifty-five and 19/100 (\$3,155.19) dollars balance of personal property remaining in the hands of said Lars Erickson as such executor * * *.”

“ 6. Said Lars Erickson thereupon transferred to himself said balance of three thousand one hundred fifty-five and 19/100 (\$3,155.19) Dollars as directed by aforesaid decree taking the same pursuant and subject to the provision of said fourth paragraph of the said will of Anna C. Erickson, deceased.”

Lars Erickson died on the first of February, 1914, leaving a last will in which he gave all of his property after the payment of his debts and funeral expenses to his sister and sister-in-law to be divided between them share and share alike. His will was duly admitted to probate and letters testamentary were duly issued to the defendant as executor. The court further found:

“ 8. That at the time of the death of said Lars Erickson all the estate which he derived under the aforesaid will of said Anna C. Erickson which then remained by him undisposed of was as follows:

“ Parcel of real estate known as Number 522 Classon Avenue, Borough of Brooklyn, City of New York,

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"The sum of one thousand five hundred (\$1,500) Dollars borrowed on such real estate by said Lars Erickson.

"9. That on or about the third day of February, 1914, Amanda Tillman, the plaintiff herein, was duly appointed by a decree of the Surrogate of the County of Kings administratrix with the will annexed of all and singular the goods, chattels and credits which were of said Anna C. Erickson, deceased, left unadministered.

"10. That on the second day of April, 1915, the plaintiff individually and as administratrix aforesaid caused a claim for said Three thousand one hundred and fifty-five and 19/100 (\$3,155.19) Dollars to be duly presented to said executor but he has refused to allow the same and on the contrary on or about May 17, 1915, caused notice to be served on the plaintiff herein that he doubts the justice and validity of the claim and disputes and rejects the same."

The said Lars Erickson did not sell the real estate owned by his wife, Anna C. Erickson, at the time of her death, but on the 18th of November, 1911, he borrowed thereon \$1,500, giving as security therefor his bond and a mortgage covering the premises so owned by said Anna C. Erickson at the time of her death, which mortgage has not been paid. The court further found:

"11. That on the second day of April, 1915, the plaintiff individually and as such administratrix as aforesaid caused a claim for said one thousand five hundred (\$1,500) dollars to be duly presented to said executor but he has refused to allow the same and on the contrary on or about May 17, 1915, caused notice to be served on the plaintiff herein that he doubts the justice and validity of the claim and disputes and rejects the same.

"14. The said sum of one thousand five hundred (\$1,500) Dollars was deposited by the said Lars Erickson in the Brevoort Savings Bank on the twentieth day of November, 1911, to his own credit."

The trial court found as a conclusion of law:

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"2. The plaintiff is entitled to judgment that the defendant retain the said sum of one thousand five hundred (\$1,500) dollars and the interest received or to be received therefrom since the death of the said Lars Erickson until the plaintiff or her executors, administrators or assigns, deliver or tender to the said defendant a certificate of satisfaction of the said mortgage together with the said bond and that thereupon the defendant shall pay over said sum and interest to this plaintiff or her executors, administrators or assigns."

The complaint as to the first cause of action which related to said \$3,155.19 was dismissed upon the merits because it had not been shown that any part thereof remained undisposed of by the said Lars Erickson. Judgment was entered accordingly dismissing the first cause of action and for \$1,500, with interest on the second cause of action "Except that at his (defendant's) election the said defendant may satisfy said bond and mortgage out of said moneys and deliver a certificate of satisfaction to the plaintiff herein or to her executors, administrators or assigns."

The plaintiff appealed to the Appellate Division from so much of the judgment as dismissed the first cause of action of the complaint and the defendant from so much of the judgment as directed the return of the \$1,500 as stated. The Appellate Division affirmed the judgment so far as it was appealed from by the plaintiff and reversed the judgment so far as it was appealed from by the defendant, and directed judgment generally dismissing the complaint. (*Tillman v. Ogren*, 182 App. Div. 672.) It is from the judgment entered upon such order that the plaintiff appeals to this court.

William Mitchell and *William Mitchell Van Winkle* for appellant. The fourth clause of the will of Anna C. Erickson did not give the right or power to Erickson to dispose of, by his will, any part of the residuary

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estate of his wife to any one but the plaintiff. (*Goebel v. Wolf*, 113 N. Y. 405.) Wills are always to be interpreted in accordance with the real intent of the testator rather than in accordance with any technical rules of law as to what certain words mean. Plaintiff's right to judgment, as prayed for, is clearly established. (*Matter of Ithaca Trust Company*, 220 N. Y. 437; *Colt v. Heard*, 10 Hun, 189; *Kent v. Fisk*, 151 App. Div. 279; *Seaward v. Davis*, 198 N. Y. 415; *Matter of Cager*, 111 N. Y. 343.) The "understanding" in the fourth clause of the will of Anna C. Erickson was binding on Lars Erickson as soon as he accepted her testamentary gift of her residuary estate under and with such understanding. The "understanding" was valid, was based on a good and sufficient consideration, and was and is enforceable in this action in equity. (*Ricker v. Leo*, 115 N. Y. 93; *Colton v. Colton*, 127 U. S. 300; *Matter of Will of O'Hara*, 95 N. Y. 403; Perry on Trusts, § 112.) The word "understanding" is equivalent to "agreement" and should be construed the same as the word "agreement" whether used in a deed or will. (*White v. White*, 60 N. J. Eq. 104; *Barkhausen v. C., M. & St. P. R. R. Co.*, 142 Wis. 292.)

Louis W. Severy for respondent. Lars Erickson took the residuary estate of his wife with an absolute power of disposition, including the power to dispose of it by will, and any part thereof which had not been previously disposed of by him passed upon his death under the residuary clause of his will to persons other than the plaintiff. (*Camp v. Waring*, 25 Conn. 520; *Lucas v. Oliver*, 34 Ala. 631; *Clay v. Wood*, 153 N. Y. 134; *Banzer v. Banzer*, 156 N. Y. 429; *Goodwin v. Coddington*, 154 N. Y. 283; *Clarke v. Leupp*, 88 N. Y. 228; *Trunkey v. Van Sant*, 176 N. Y. 535; *Trask v. Sturges*, 170 N. Y. 482; *Washbon v. Cope*, 144 N. Y. 287; *Byrnes v. Stilwell*, 103 N. Y. 453; *Roseboom v. Roseboom*, 81 N. Y. 356; *Freeman v. Coit*, 96 N. Y. 63; *Thornhill v. Hall*, 2 Cl. & Fin. 22; *Matter of Geissler*, 72 App. Div. 85; *Matter of Arrowsmith*,

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162 App. Div. 623; *Sands v. Waldo*, 100 Misc. Rep. 288.) The judgment of the Special Term dismissing the first cause of action upon the merits having been unanimously affirmed by the Appellate Division, this court will not inquire into the sufficiency of the evidence. (*Ostrom v. Greene*, 161 N. Y. 353; *Race v. Krum*, 222 N. Y. 410; *Marden v. Dorothy*, 160 N. Y. 39; *Poel v. Brunswick-Balke-Collender Co.*, 216 N. Y. 310; *Middleton v. Whitridge*, 213 N. Y. 499; *Commercial Bank v. Sherwood*, 162 N. Y. 310; *Fox v. Proctor*, 217 N. Y. 711.)

CHASE, J. This action is brought to recover the amount of the two claims presented by the plaintiff to the defendant and which were rejected by him. The complaint is divided into two causes of action, one for the recovery of said \$3,155.19 and interest, and the other for the recovery of said \$1,500 and interest. Even if we admit that the plaintiff is right in her contentions in regard to the meaning and effect of the will of Anna C. Erickson, she cannot recover either of said amounts except upon a finding that such amounts or some part thereof, or of one of them, were derived by Lars Erickson under her will and remained undisposed of by him at his decease. (*Seaward v. Davis*, 198 N. Y. 415.)

The Special Term found in substance that none of the \$3,155.19 remained undisposed of by Lars Erickson immediately before his decease and the complaint as to the first cause of action was thereupon dismissed. The Appellate Division unanimously affirmed the judgment dismissing such first cause of action. A unanimous affirmance by the Appellate Division imports that there is evidence supporting or tending to sustain the findings of fact made by the trial court upon which such judgment was entered by it. (*Tidd v. Skinner*, 225 N. Y. 422; *Poel v. Brunswick-Balke-Collender Co.*, 216 N. Y. 310; *Fox v. Proctor*, 217 N. Y. 711.)

This court cannot review the question of fact upon the determination of which the judgment dismissing the first

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cause of action is based. The judgment dismissing the complaint so far as it relates to the claim for \$1,500 and interest is before us on the merits.

The action is not in terms for the construction of the will of Anna C. Erickson although a determination of the plaintiff's claims so far as we are permitted to consider them requires us to determine the intention of the testatrix as expressed in the will. The plaintiff's contentions are wholly based upon the provisions of the will, and the fact that Lars Erickson accepted the devise and bequest to him under such will. No prior or other contract between Anna C. Erickson and her husband is pleaded or claimed and no evidence was presented at the trial in any way relating thereto.

In considering the will it is unnecessary to discuss the power and authority of the testatrix if she had so desired to give to her husband a life estate in her residuary property with authority to use the principal thereof in his lifetime, and to her sister all or any part of such residuary property remaining unused at his death.

A gift to one followed by a gift to another of such part thereof as may remain at the decease of the first taker, can be enforced when the intention of the giver is clear and definite to limit the gift to the first taker to a life estate with power to dispose of the principal or any part thereof during his lifetime and to give to another such part of the principal as is not disposed of in the lifetime of the first taker. (*Seaward v. Davis, supra.*)

The gift over after a gift that is apparently absolute is sustained because it is ascertained that it was not the giver's intention to make an absolute gift, but one qualified and limited by the subsequent or other provisions of the will or instrument creating the gifts. (*Leggett v. Firth*, 132 N. Y. 7.) The common-law rule governing repugnant gifts has been changed by statute. (Real Property Law [Cons. Laws, ch. 50], sec. 57; Personal Property Law [Cons. Laws, ch. 41], sec. 11.)

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The first part of the fourth paragraph of the will under consideration which we have quoted provides: "I give and bequeath to my beloved husband Lars Erickson, all of the rest and remainder of my estate both real and personal to have and to hold the same to him his heirs and assigns forever." It constitutes a clear, certain, unqualified and absolute gift to her husband. If she had not added a further provision in the will no question could possibly have arisen as to her meaning and intention, or as to his absolute title to such rest and residue of her estate.

It cannot be disputed that at the time she made her will it was her wish and desire that her husband should give what remained of such rest and residue of her property undisposed of at the time of his death to her sister. Did she intend to do more than express such wish and desire? If she had intended to qualify and limit the gift to her husband to a life estate with the right to use so much of the principal thereof as he should choose during his life, she should have provided in the will for such limitation in as plain and clear terms as she had used in giving him such rest and residue. Such intention could have been clearly and definitely stated by giving the rest and residue of her property to her sister subject to such prior gift to her husband. She did not leave such rest and residue in trust nor did she by clear, certain or other terms, qualify the absolute gift to him. The statement by her in the latter part of said fourth paragraph of her will emphasizes and makes certain that the gift to her husband is absolute because she says that Lars Erickson "*shall give and turn over to my sister Amanda Tillman*" what shall remain by him undisposed of. The testatrix trusted her husband to respect her wish and desire in the disposition of any part of the rest and residue of her property not used by him in his lifetime. The principal contention against the construction of the will as claimed by the defendant rests in the use by the testatrix of the word "understanding" which it is said

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imports a contract already made or arising from an acceptance by her husband of the bequest and devise.

The word "understanding" is one of common use but of varying meaning. (*Barkhausen v. Chicago, M. & St. P. R. Co.*, 142 Wis. 292.) In *Camp v. Waring* (25 Conn. 520) the court say: "The context here shows that the word 'understanding,' always a loose and ambiguous one, unless accompanied with some expression to show that it constituted a meeting of the minds of the parties upon something respecting which they intended to be bound, was used, not to express anything which was the subject of an agreement or contract between the parties, but only that kind of expectation or confidence upon which parties are frequently willing to rely without requiring any binding stipulation."

It is at least not clear that the testatrix by the use of the word "understanding" intended that her husband could not accept the gift to him without thereby becoming obligated as by contract to give any part of the rest and residue of her property remaining undisposed of by him at his decease to her sister. It is assumed by the parties that no contract was ever made upon which the will is based, and that the obligation of Lars Erickson to the testatrix's sister, arises if at all, by the acceptance of the bequest and devise.

While an expectant estate may exist subject to a prior estate with an absolute power of disposition, and although such expectant estate may be defeated in any manner or by any act or means which the party creating such estate in the creation thereof has provided for or authorized (Real Property Law, sec. 57; Personal Property Law, sec. 11), an absolute estate is repugnant as a matter of fact to a gift over to a third person. It is because of such repugnance in fact that an apparently absolute estate cannot be cut down or qualified unless the intention is clear and definite.

In *Matter of Ithaca Trust Company* (220 N. Y. 437, 441)

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this court say: "A remainder cannot be limited upon an absolute estate in fee. Where a gift is provided by will and such gift is intended to be absolute, a gift over is repugnant to such absolute gift and void and the purported gift over must be treated as a mere expression of a wish or desire regarding the distribution of such part of the gift as may remain undisposed of at the death of the donee."

Where there is an absolute gift of real or personal property, in order to qualify it or cut it down the latter part of the will should show equally clear intention to do so by use of words definite in their meaning and by expressions which must be regarded as imperative. (*Clay v. Wood*, 153 N. Y. 134; *Matter of Gardner*, 140 N. Y. 122; *Roseboom v. Roseboom*, 81 N. Y. 356; *Post v. Moore*, 181 N. Y. 15.)

The gift to Lars Erickson in this case was absolute. There is no gift therein to Amanda Tillman. Neither is there such clear and certain statement of intention shown by the will as to make Lars Erickson through the acceptance of the devise and bequest to him obligated as by contract to give any undisposed of part of the rest and residue of Anna C. Erickson's property to Amanda Tillman, nor to make such contractual obligation a specific charge upon the gift to Lars Erickson.

An agreement entered into between a testatrix and a legatee that is clear and definite in its terms and which constitutes the basis in whole or in part for a legacy will be enforced by the courts. So in *Seaver v. Ransom* (224 N. Y. 233), which was an action to recover on a contract made by a husband with his wife, it appeared that both were advanced in years and Mrs. Beaman was about to die. Her husband, who was or had been a judge, drew her will according to her instructions. He was named therein as residuary legatee and executor. The plaintiff in the action was a niece, in ill-health, sometimes a member of the Beaman household. The story of the contract is briefly and succinctly told in the opinion as follows:

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"When the will was read to Mrs. Beaman she said that it was not as she wanted it; she wanted to leave the house to plaintiff. She had no other objection to the will, but her strength was waning and although the judge offered to write another will for her, she said she was afraid she would not hold out long enough to enable her to sign it. So the judge said if she would sign the will he would leave plaintiff enough in his will to make up the difference. He avouched the promise by his uplifted hand with all solemnity and his wife then executed the will. When he came to die it was found that his will made no provision for the plaintiff." (p. 235.) This court held: "The equities are with the plaintiff and they may be enforced in this action, whether it be regarded as an action for damages or an action for specific performance to convert the defendants into trustees for plaintiff's benefit under the agreement." (p. 241.)

So, also, where there is a clear and definite gift by will which by the terms of the will or by operation of law is clearly and definitely charged upon the real property owned by the testator at his death, a person accepting a gift of such real property thereby obligates himself to pay the charge. (*Brown v. Knapp*, 79 N. Y. 136; *Dinan v. Coneys*, 143 N. Y. 544.)

The plaintiff in this case has not shown that a contract was made between Anna C. Erickson and her husband on which the will was based or which contemplated a charge upon the gift to him. She has not shown a gift to her by the will of Anna C. Erickson. Upon the facts before us she cannot sustain her complaint.

The judgment should be affirmed, with costs.

HISCOCK, Ch. J., POUND, McLAUGHLIN, CRANE and ANDREWS, JJ., concur; CARDOZO, J., dissents from judgment of Appellate Division in so far as it dismisses the second cause of action.

Judgment affirmed.

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ANNIE E. LANG, as Administratrix of the Estate of OSCAR C. LANG, Deceased, Respondent, v. THE NEW YORK CENTRAL RAILROAD COMPANY, Appellant.

Railroads — negligence — when railroad company not liable for death of an employee under the Federal Safety Appliance Act.

Where an employee of a railroad engaged in interstate commerce who was riding on a freight car, which collided with a car having no drawbar or coupler, was fatally crushed between the car upon which he was riding and the defective car, the collision was not the proximate result of the absence of the coupler and drawbar where there was no attempt to couple to the defective car. It was not intended to provide a place of safety between colliding cars, hence the decedent cannot recover under the Federal Safety Appliance Act (Act of Congress, March 2, 1893, ch. 196, as amended). (*St. Louis & San Francisco R. R. Co. v. Conarty*, 238 U. S. 243, followed.)

Lang v. N. Y. C. R. R. Co., 187 App. Div. 967, reversed.

(Argued December 4, 1919; decided January 6, 1920.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 8, 1919, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for the death of plaintiff's intestate alleged to have been occasioned through the negligence of defendant, his employer.

The facts, so far as material, are stated in the opinion.

Maurice C. Spratt for appellant. The court erred in refusing to grant defendant's motion for a nonsuit and for a direction of a verdict. (*St. Louis & S. F. R. R. Co. v. Conarty*, 238 U. S. 243.)

Hamilton Ward and Julius A. Schrieber for respondent. No error was committed by the court in refusing to grant defendant's motion for a nonsuit, or to direct a verdict. (*Union Pacific R. R. Co. v. Huxoll*, 245 U. S. 535; *Wagner*

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Case, 241 U. S. 476; Parker Case, 242 U. S. 56; Otos Case, 239 U. S. 349; Rigsby Case, 241 U. S. 33; Delk v. St. Louis & S. F. R. Co., 220 U. S. 580; Spokane, etc., v. Campbell, 217 Fed. Rep. 524; G. T. W. Ry. Co. v. Lindsay, 233 U. S. 42; L. & N. Ry. Co. v. Layton, 243 U. S. 617; M. & S. L. Ry. Co. v. Gotschall, 244 U. S. 66; Southern Ry. Co. v. Snyder, 205 Fed. Rep. 868.)

ANDREWS, J. Where disregard of the Safety Appliance Act causes loss to one of the class for whose special benefit it was enacted his right to recover damages is implied. (*Texas & Pacific Railway Company v. Rigsby, 241 U. S. 33.*) Not so, as to others.

In *St. Louis & San Francisco Railroad Company v. Conarty* (238 U. S. 243) a switch engine collided with a freight car having no coupler or drawbar. The switch engine was not to handle this car but was on its way to a point some distance beyond it. Conarty, standing on the footboard of the engine, was killed by the collision. There was evidence that had the coupler and drawbar been present the engine and the car would have been held so far apart as to have prevented the injury.

The Supreme Court said that section 2 of the act was intended to provide against the risk of coupling and uncoupling and to obviate the necessity of men going between the ends of the cars. It was not intended to provide a place of safety between colliding cars. Therefore, when a collision was not the proximate result of the violation of these regulations, where there was no endeavor to couple or uncouple a car or to handle it in any way, there can be no recovery under the act. The absence of a coupler and drawbar was not a breach of duty toward a servant in that situation.

If, however, a collision was proximately caused by the failure of the railroad to obey the statute, it was not intended to hold that only those servants actually engaged in coupling or uncoupling cars could recover for the

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resulting injuries. Any servant so injured equally comes within the protection of the statute. (*Louisville & Nashville Railroad Company v. Layton*, 243 U. S. 617; *Minn. & St. Louis R. R. Co. v. Gotschall*, 244 U. S. 66.)

In the case before us the defendant was engaged in interstate commerce. A car without drawbar or coupler was standing on the siding. The plaintiff's intestate was a brakeman and was riding on a second car kicked upon the same siding. A collision occurred and the deceased was crushed between the car upon which he was riding and the defective car. As in the *Conarty* case, it was plain that had the coupler and drawbar been present the two cars would have been held so far apart that he would have escaped uninjured. There was no attempt to couple on to the defective car or to handle it in any way.

Under these circumstances Mr. Lang was not one of the persons for whose benefit the Safety Appliance Act was passed. The collision was not the proximate result of the absence of the coupler and drawbar. Their presence was not required so that they might act as bumpers.

It is said that had the car not been defective the work on hand would have been done in a different way. Assuming that this is so, still the collision was not the proximate result of the defect.

The judgments of the Trial Term and of the Appellate Division must be reversed and the complaint dismissed, with costs in all courts.

HISCOCK, Ch. J., COLLIN, HOGAN and McLAUGHLIN, JJ., concur; CHASE and CRANE, JJ., dissent.

Judgments reversed, etc.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Respondent, *v.* NATIONAL BANK OF COMMERCE IN
NEW YORK, Appellant.

Bills, notes and checks — forgery — action by drawer of checks to recover from bank, which paid checks on indorsements forged by drawer's agent who afterward indorsed in his own name for his own account — indorsement by agent not guaranty of validity of forged indorsements binding on drawer — failure of drawer, having knowledge of other forgeries of its agent, to notify bank — when effect of such failure question of fact for the jury — erroneous exclusion of evidence.

1. Where plaintiff, a life insurance company, sent its checks drawn on the defendant bank to its general manager and agent for delivery to its policyholders, to whom they were made payable, and the agent forged the names of the payees, deposited the same to his personal account in a bank where he had an account and converted the proceeds thereof to his own use, and the defendant bank has refused to repay to plaintiff the amount of such checks, which were paid by it, the defendant cannot, in an action to recover the amount, avoid its liability on the ground that the plaintiff is precluded from asserting the forgery of the payees' names on such checks because the general manager and agent of the plaintiff by his indorsement of the checks guaranteed the genuineness of the indorsements of the payees, and that the plaintiff is bound thereby. The manager of plaintiff in forging the names of the payees of the checks and his indorsements of the checks following the forged indorsements was acting independently of his agency and in violation of the same, and hence the plaintiff is not responsible therefor. The guaranty of the genuineness of the indorsements of the payees by the manager's subsequent indorsements of such checks was the personal guaranty of the manager and not that of the plaintiff.

2. Where it appears that, prior to the transactions in question, the plaintiff's general manager and agent had forged signatures to other checks in the same way and that the plaintiff had, or, with reasonable investigation, might have had knowledge thereof; that actual proof of the forgery of one of the checks in question was in plaintiff's possession in time for it to have stopped the payment thereof, and that the manager had confessed and made good to plaintiff part of its losses due to such forged indorsements, it was a question for the jury to determine whether the plaintiff was negligent in failing to examine

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the indorsements on the checks which had been returned to it by the defendant and other banks with the genuine signature of the payees in its possession prior to the payment of the forged checks in question and whether such negligence and the consequent failure of the plaintiff to notify the defendant of the information that it would have obtained by such examination contributed to the payment of the forged checks by the defendant.

3. It was also a question for the jury herein whether, after plaintiff knew or should have known that its manager had forged the payee's indorsement on another check, which plaintiff thereafter made good to the payee, the plaintiff was negligent in failing to notify the defendant of such facts and the consequent danger of paying other checks, sent by the plaintiff to its manager for delivery to the payees, without special information and knowledge in regard to the genuineness of the payees' indorsements thereon.

4. It was error for the trial court to exclude reasonable evidence tending to show that the amount recovered by the plaintiff from its general manager, after the defendant bank had paid the forged checks in question, included a repayment to it of the amounts in whole or in part charged to the plaintiff by reason of defendant's payment of the forged checks in question, and also whether the defendant was prejudiced by the plaintiff's act in withholding its knowledge of the crimes of its general manager until after his arrest therefor.

Prudential Ins. Co. v. Nat. Bank of Commerce, 184 App. Div. 885, reversed.

(Argued December 5, 1919; decided January 6, 1920.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 10, 1918, unanimously affirming a judgment in favor of plaintiff entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

Frank Parker Ufford for appellant. The indorsement of the checks by the plaintiff's agent Eaton was equivalent to a guaranty of the genuineness of the prior indorsements which the plaintiff is estopped to deny, and the plaintiff is precluded thereby, as a matter of law, from recovering in this action. (*London L. Ins. Co. v. Molson's*

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Bank, 5 Ontario L. R. 407; *Otis Elevator Co. v. First Nat. Bank*, 163 Cal. 31.) The trial court erred in holding that there was no evidence of negligence on the part of the plaintiff and in directing a verdict against the defendant. (*Morgan v. U. S. Mort. & Trust Co.*, 208 N. Y. 218; *Meyers v. S. W. Nat. Bank*, 193 Penn. St. 1; *Leather Mfrs. Bank v. Morgan*, 117 U. S. 96; *N. B. & M. Ins. Co. v. Merchants Nat. Bank*, 161 App. Div. 341.) The plaintiff's concealment of the forgeries after it discovered them precludes a recovery. (*Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 96; *Rothschild v. Title G. & T. Co.*, 204 N. Y. 458.) The indorsement of the checks by the plaintiff's agent, Eaton, acting within the apparent scope of his authority, was equivalent to a guaranty of the genuineness of the prior indorsements which the plaintiff is estopped to deny. (*London Life Ins. Co. v. Molson's Bank*, 5 Ontario L. R. 40; *Campbell v. Upton*, 66 App. Div. 434; 171 N. Y. 644; *Goshen Nat. Bank v. State*, 141 N. Y. 379.) The evidence of negligence required the submission of the case to the jury. It was error to direct a verdict. (*Shipman v. Bank of New York*, 126 N. Y. 318.)

R. Dulany Whiting for respondent. The plaintiff is not responsible for nor to be bound by the act of Eaton, its agent, in the forgery of the payees' indorsements upon the checks in suit. (*Welsh v. German American Bank*, 91 N. Y. 74; *Henry v. Allen*, 151 N. Y. 11.) There was no negligence on the part of the plaintiff adduced upon the trial which would have justified the court in submitting the case to the jury. (*N. B. & M. Ins. Co. v. Merchants Nat. Bank*, 161 App. Div. 341; *Prudential Life Ins. Co. v. National Bank of Commerce*, 177 App. Div. 438; *Metallurgical Securities Co. v. M. & M. Nat. Bank*, 171 App. Div. 321; *Critten v. Chemical Nat. Bank*, 171 N. Y. 219; *Harlem Building Assn. v. Mercantile Co.*, 10 Misc. Rep. 680; *Carpenter v. Stillwell*, 11 N. Y. 161; *Hamlin v. Sears*, 82 N. Y. 327.)

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CHASE, J. The plaintiff is an insurance corporation having its principal place of business in Newark, New Jersey. In 1912 and prior to that time, one Eaton was its manager and agent for the states of Maine and New Hampshire, and had his office at Portland, Maine. In the course of the plaintiff's business and on March 18, 1912, it sent to Eaton at Portland a check drawn on the defendant bank to the order of Rena C. Phipps for \$1,983.26, dated on that day which stated on the face of the check that it was "In full for all claims under policy No. 164,163" (being a policy in which said Phipps was the beneficiary), and on the 24th day of March, 1912, another check on said bank to the order of Ella M. Wade for \$1,633.70, on the face of which was a similar statement to the effect that it was in full of a specified policy. Said checks were sent to Eaton to be delivered by him to the payees thereof but instead of delivering the checks in accordance with his instructions he, in each case, forged the name of the payee to the check and deposited the same *to his personal account* with the Fidelity Trust Company of Portland, Maine, and converted the proceeds thereof to his own use. The Phipps check was paid by the defendant on March 20, 1912, and the Wade check on March 28, 1912. The plaintiff demanded of the defendant that it return the amount so paid on said checks to it, but the defendant has neglected and refused to do so. This action is brought to recover the amount of said checks with interest. The trial court directed a verdict in favor of the plaintiff and the judgment entered thereon has been unanimously affirmed by the Appellate Division.

The Negotiable Instruments Law (Chapter 38 of the Consolidated Laws) provides: "Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge

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therefor, or to enforce payment thereof, against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority." (Sec. 42.) It is conceded that the name of the payee in each of said checks was forged thereon by Eaton, and that he also personally indorsed said checks and that they were paid by the defendant as stated.

The defendant claims that the plaintiff is precluded from asserting in this action the forgery of the payee's name on said checks respectively, because Eaton, the manager and agent of the plaintiff, as stated, by his indorsement of the checks guaranteed the genuineness of the indorsement of the payees, and that the plaintiff is bound thereby.

The defendant's claim in substance is that Eaton by personally indorsing the checks in legal effect said to the trust company and all subsequent holders of the checks and to the defendant that the signatures of the payees on the checks and each of them was the genuine signature of such payee and that he guaranteed the same and also that as Eaton was the representative of the plaintiff at Portland his representation and guaranty was the representation and guaranty of the plaintiff company.

The defendant bases its claim in large part upon the reasoning and conclusion stated in *London Life Insurance Company v. Molsons Bank* (5 Ont. L. Rep. 407) which is a report of a case at a trial of the issues therein before a judge without a jury. The decision in that case so far as it supports the contention of the defendant is not in accord with the decisions of this court.

This court in *Welsh v. German American Bank* (73 N. Y. 424) say: "The fact that the plaintiff entrusted checks to his clerk * * * who forged the endorsements, made him no more responsible than if he had entrusted them to an expressman * * * and the expressman had forged the name of the payee."

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And in *Henry v. Allen* (151 N. Y. 1, 11) this court say: "When an agent abandons the object of his agency and acts for himself by committing a fraud for his own exclusive benefit, he ceases to act within the scope of his employment and to that extent ceases to act as agent." (See *Shipman v. Bank of the State of N. Y.*, 126 N. Y. 318; *Frank v. Chemical National Bank of N. Y.*, 84 N. Y. 209.) Eaton had no apparent authority as *an agent of the plaintiff* to acquire the checks for deposit *in his personal account*.

We are of the opinion that Eaton in forging the names of the payees of the checks and his indorsement of the checks following such forged indorsements, was acting independently of his agency and wholly in violation of the same, and that the plaintiff is not responsible therefor. The guaranty of the genuineness of the indorsement of the payees by reason of Eaton's subsequent indorsement of such checks was the personal guaranty of Eaton and not that of the plaintiff.

It is also claimed by the defendant that the plaintiff is precluded in this action from setting up the forgeries by Eaton of the checks under consideration because of its negligence in sending such checks to Eaton after knowledge of his previous forgeries and misapplication of its money or of facts which required the plaintiff to have made further inquiry and investigation into his acts before sending him such further checks.

It is also claimed by the defendant that the record discloses such conduct on the part of Eaton of which the plaintiff had knowledge or ought to have had knowledge before the checks under consideration were paid as required it in good faith and fair dealing to have informed the defendant not to pay such checks or at least which required the plaintiff to disclose to the defendant the possibility of irregularities or forgeries by Eaton in connection with checks sent by it to its Portland office that the defendant might have had an opportunity for special

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investigation of the indorsement of such checks before paying them.

Eaton had held his position with the plaintiff at the time of the forgeries of the two checks under consideration for about four years. Such forgeries were among the last of a long series of fraudulent and criminal acts in connection with his position as a district manager and agent of the plaintiff. As long prior to 1912 as the early part of 1910 one of the plaintiff's policyholders made application to Eaton for a loan by the plaintiff. An application therefor was forwarded to the plaintiff and passed upon favorably, which resulted in a check for the amount of the loan payable to the policyholder being sent to Eaton. He forged the name of the payee on that check and deposited it in his personal account in the Fidelity Trust Company. Some time thereafter the policyholder who had not received the amount of the loan wrote to the plaintiff making complaint because of the delay. The plaintiff wrote to Eaton sending him a copy of the letter of the policyholder. Eaton forwarded his personal check to the policyholder and wrote the plaintiff that payment had been made. The check of the plaintiff bearing the forged indorsement of the payee's name must have been in its possession when the letter of complaint was received, and the plaintiff, with the genuine signature of the policyholder on the application for the loan in its possession, could have known of the forgery by Eaton, if it had made any reasonable investigation of the check and documents in its possession. Similar forgeries by Eaton continued thereafter from time to time and became more and more frequent until during the six months prior to March, 1912, Eaton forged the payee's indorsement on substantially every check that was forwarded to him for delivery to policyholders. It appears that Eaton forged the signature of the payee on one hundred or more of such checks.

Eaton collected the premiums on the plaintiff's policies

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in the states mentioned. A thirty-day period of grace was allowed the policyholders after the premiums were due. Eaton took advantage of this fact to use the premiums promptly paid, for himself. He not only persistently used such premiums during such period of grace, but frequently upon excuses to the plaintiff continued to use such money even after the thirty-day period had expired. His use of such premiums was in effect called to the plaintiff's attention at different times by letters from policyholders saying in substance that they had not received a receipt for the premiums paid by them. When Eaton's attention was called by the plaintiff to such complaints he would reply with some feigned excuse for his failure to deliver such receipts.

The plaintiff inspected Eaton's office every six months and the defendant claims that it knew or should have known at each of such times that Eaton had misappropriated some of the premiums collected by him. In November, 1911, an examiner for the plaintiff was at Eaton's office. At that time he had misappropriated premiums collected to the extent of about \$4,000. After the inspector arrived and while he remained at the office Eaton from day to day deposited in an account kept by the plaintiff in its name in said trust company of Portland exceptionally large amounts to make good the premiums that had been collected by him and not reported as paid. By such deposits he reduced the amount of his misappropriations about one-half. When the inspector left the office the misappropriations by Eaton of premiums collected by him and not settled and adjusted amounted to about \$2,000, knowledge of which the defendant claims that the plaintiff had or should have had at that time.

On February 27, 1912, the plaintiff sent to Eaton its check for \$425 to the order of John H. Cuzner and Eva May Cuzner in payment of the cash surrender value of a policy on Cuzner's life, in which Eva May Cuzner was named as beneficiary. It was sent to Eaton for

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delivery to the Cuzners who resided at Belfast, Maine, about one hundred and twenty-five miles distant from Portland. Eaton forged the indorsement of the Cuzners thereon, and deposited it to his personal account and the same was without delay collected from the Union National Bank of Newark on which it was drawn. It was paid by the Union National Bank on March 1. That bank returned plaintiff's checks paid by it daily. This particular check was returned to the plaintiff on March 2, but the receipt by the Cuzners for the payment was not returned until many days thereafter.

On March 19, the day after the Phipps' check was drawn but before it was paid, the plaintiff received a letter from Mr. Cuzner dated March 18, in which he called the plaintiff's attention to the surrender of his policy early in February for the purpose of obtaining the cash value thereof, and said: "I have heard nothing from you since then * * *. Please let me hear from you at earliest convenience."

The jury could have found that a casual comparison of the indorsements on the Cuzner check in its possession with the genuine signature of the Cuzners also in plaintiff's possession, would have shown that the indorsements were not the genuine signatures of the Cuzners.

Nothing was done by the plaintiff relating thereto so far as appears until March 21, when the plaintiff wrote to Eaton saying that it had received a letter from Cuzner. In the letter it says that it forwarded a check to him, Eaton, on February 27 for the amount of the surrender value of the Cuzner policy and further says: "On referring to the check which has been paid and returned to us by the Union National Bank, Newark, N. J., we find that it bears the endorsement of the payees and also your endorsement. Kindly inform us if you cashed this check for Mr. Cuzner."

The plaintiff was by the letter of Mr. Cuzner received by it March 19 informed that he was at Belfast and had not received its check although plaintiff knew that the

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check had in fact been promptly returned from Portland and paid upon the apparent indorsement of the payees followed by Eaton's personal indorsement. No notice was given to the defendant of the facts about the Cuzner check although the Phipps check was then outstanding and unpaid. Eaton replied that the check had been delivered to Spencer, a special agent, and returned by him because the insured wished two checks for different amounts. He then says: "I therefore deposited the check and forwarded my checks in place and it seems the delay was occasioned by Mr. Spencer being out of town." He adds that the matter is now satisfactorily adjusted. This was received by the plaintiff March 24. The check was then in the possession of the plaintiff and it had been considered by it as appears by plaintiff's letter to Eaton and it necessarily knew that the statements in the letter of Eaton were false. On March 24 Cuzner wrote the plaintiff acknowledging the receipt of a check from Eaton on March 23, nearly a month after plaintiff's check had been sent to Eaton for the Cuzners and it had been returned to the plaintiff apparently indorsed by the Cuzners. In such letter Cuzner said: "Enclosed find letter I received with check from Mr. Eaton, I received no check from you so could not have possibly endorsed it." The letter of Eaton to Cuzner inclosed stated that the check of \$425 was handed to him therewith and adds: "Will arrange for Mr. Spencer to return the check which is in his possession." This statement in the letter by Eaton to Cuzner was not true and the plaintiff then had in its possession indisputable evidence of its being untrue because as stated the check with the forged indorsement was in its possession and had been for days. Notwithstanding this evidence in the possession of the plaintiff it, on March 25, sent to Eaton the check payable to Ella M. Wade. He immediately forged the name of the payee thereto and placed it in his customary way to his personal account and it came

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back to the defendant bank for payment on March 28. The correspondence relating to the Cuzner check was called to the attention of the plaintiff's superintendent of Eastern agencies on March 27, and he stated that Eaton would be at the office the next day. On the morning of the 28th Eaton arrived at the plaintiff's office and confessed to said superintendent of agencies that he had forged the indorsements on the Cuzner check. He was referred to the president of the plaintiff where he made a similar confession but so far as appears he was not questioned in any way whatever in reference to other forgeries. So far as appears all other transactions were ignored. The conversation with said superintendent of agencies and with the president of the plaintiff occurred in the morning of March 28. The payment of the Wade check could have been stopped at the defendant bank at any time before three o'clock in the afternoon of that day. Nothing was done by the plaintiff. It does not appear that any examination whatever was made prior to March 28, 1912, with reference to the genuineness of the indorsement of the one hundred or more checks that had been forged by Eaton. Unless special request was made by the plaintiff to the defendant bank, the checks paid by it were not returned to the plaintiff by that bank until the first of the following month. The checks paid by it in February were returned to the plaintiff March 1, and those paid in March were returned April 1. So far as appears no special requisition for the return of the checks that had been sent to the Portland office was asked by the plaintiff. On April 9, Eaton wrote the plaintiff confessing that he had forged the indorsements on the Phipps and on the Wade checks. In the meantime the plaintiff had its examiners at the office of Eaton in Portland and reports were made from time to time by them to it. Eaton had also been attempting to borrow of the plaintiff on the value of the anticipated renewal premiums on policies written pursuant to the

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contract between Eaton and the plaintiff to pay his indebtedness. The plaintiff paid the claims of Phipps and of Wade by giving them and each of them a new check for the amount due them respectively. It is conceded that the plaintiff received some amount from Eaton to make good its losses by reason of his forgeries and misappropriations of its money, but the court refused to allow evidence of the amount of such receipts. On April 22 on the plaintiff's complaint or by its procurement Eaton was arrested. After such arrest the plaintiff for the first time notified the defendant bank that the indorsements on the checks now in suit had been forged and demanded the return of the money to it.

A depositor of a bank who receives from it a statement of his account with its paid checks as vouchers is bound to examine the account and vouchers and to report to the bank without unreasonable delay any errors which may be discovered. (*Morgan v. U. S. Mortgage & Trust Co.*, 208 N. Y. 218; *Leather Mfrs. Bank v. Morgan*, 117 U. S. 96; *Dana v. National Bank of the Republic*, 132 Mass. 156.)

The general rule stated in the *Morgan* case in this court has been commonly held not to extend to an examination of the indorsements of the payee of checks to ascertain the genuineness of such indorsements.

In *Critten v. Chemical National Bank* (171 N. Y. 219, 227) this court say: "When a depositor has in his possession a record of the checks he has given, with dates, payees and amounts, a comparison of the returned checks with that record will necessarily expose forgeries or alterations. It is true that it will give no information as to the genuine character of the endorsements, and because the depositor has no greater knowledge on that subject than the bank, it owes the bank no duty in regard thereto. (*Welsh v. German-American Bank*, 73 N. Y. 424; *Shipman v. Bank of the State of New York*, 126 N. Y. 318.) It is also true that verification of the returned checks would not prevent a loss by the bank in the case

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of payment of a single forged check and probably not in many cases enable the bank to obtain a restitution of its lost money. It would, however, prevent the successful commission of continuous frauds by exposing the first forgeries. * * * Considering that the only certain test of the genuineness of the paid check may be the record made by the depositor of the checks he has issued, it is not too much, in justness and fairness to the bank, to require of him, when he has such a record, to exercise reasonable care to verify the vouchers by that record. * * * If the depositor has by his negligence in failing to detect forgeries in his checks and give notice thereof caused loss to his bank, either by enabling the forger to repeat his fraud or by depriving the bank of an opportunity to obtain restitution, he should be responsible for the damage caused by his default, but beyond this his liability should not extend."

The reason given for not extending the rule to include an examination of indorsements for the purpose of determining whether they are genuine is that the depositor has no greater knowledge on the subject of the genuineness of the signature of the payee than the bank. In the case now before us the plaintiff had in its possession the genuine signatures of each of the payees in the several checks whose names were forged by Eaton. Whether the plaintiff exercised reasonable care in examining the checks retained as vouchers by the defendant is a question of fact. (*Critten v. Chemical National Bank, supra; Leather Manufrs. Bank v. Morgan, supra; Shipman v. Bank of the State of New York, supra.*)

We think in this case that it was at least a question of fact upon the evidence before the court, a brief statement of which we have given, whether the plaintiff was negligent in failing to examine the indorsements on the checks which had been returned to it by the defendant and other banks with the genuine signatures of the payees in its possession prior to the payment of the

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Phipps and Wade checks and whether such negligence and the consequent failure of the plaintiff to notify the defendant of the information that it would have obtained by such examination contributed to the payment of said checks by the defendant bank.

It is permitted to a bank to escape liability for repayment of amount paid out on forged checks by establishing that the depositor has been guilty of negligence which contributed to such payment and that it has been free from any negligence. (*Morgan v. U. S. Mtge. & Trust Co., supra.*)

We think it was also a question of fact whether the plaintiff after it knew or should have known that Eaton had forged the indorsement on the Cuzner check was negligent in failing to notify the defendant of such facts and the consequent danger of paying other checks sent by the plaintiff to its Portland office without special information and knowledge in regard to the genuineness of the payee's indorsements thereon.

We are also of the opinion that evidence to a reasonable extent should have been permitted to show that the amount recovered by the plaintiff from Eaton after the defendant bank had paid the Phipps and Wade checks included a repayment to it of the amounts in whole or in part charged to the plaintiff by reason of its payment of said checks and also whether the defendant bank was prejudiced by the plaintiff withholding its knowledge of Eaton's crimes until after his arrest on April 22.

Because of the failure of the court to submit the questions of fact arising upon the trial to the jury for its determination thereof and because of errors in the rulings of the court in excluding material evidence the judgments should be reversed and a new trial granted, with costs to abide the event.

HISCOCK, Ch. J., COLLIN, HOGAN, McLAUGHLIN, CRANE and ANDREWS, JJ., concur.

Judgments reversed, etc.

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ROBERT L. STEVENS et al., as Executors of FREDERICK C. STEVENS, Deceased, Respondents, v. THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

Insurance (life) — loans on policies — cancellation of policies for failure of insured to pay loans — what constitutes sufficient notice to borrower of intention of company to cancel policies for borrower's default to renew loans or pay interest thereon.

Plaintiff's decedent borrowed money on five life insurance policies, as collateral, from the company which had issued them, giving promissory notes therefor, in each stating that he had deposited with and assigned to the company as collateral security one of such policies and agreeing that if he failed to repay the note or interest when due the company "without further notice and without further demand for payment may cancel said policy as of the date of default" and apply to the payment of the note and interest the sum fixed as the surrender value of the policy and pay the balance, if any, on demand to the parties entitled thereto. The borrower failed to pay the notes when due, after they had been renewed on the same terms. The company wrote him before the notes became due and on two subsequent occasions, calling his attention to the matter and requesting payment. No action was taken by the borrower and forty-five days after the notes became due they were canceled as of the date when due. *Held*, that the contract is clear and its terms unambiguous and on default the company might cancel the policies without further notice. Such cancellation became effective without notice to decedent and was not subject to the condition that he should be first paid the balance due him or informed that the company held that sum subject to his demand, nor did the company by its acts waive its right to cancel without further notice.

Stevens v. Mutual Life Ins. Co., 183 App. Div. 629, reversed.

(Argued December 8, 1919; decided January 6, 1920.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered June 13, 1918, affirming a judgment in favor of plaintiffs entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

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Frederick L. Allen and *Murray Downs* for appellant. The defendant was not required to make any demand for payment of the loan or interest or give the insured notice of cancellation, or, having canceled, to give notice of the application of the cash surrender consideration to the payment of the loans, or that there was a surplus. (*Clare v. Mutual Life Ins. Co.*, 201 N. Y. 492; *Palmer v. Mutual Life Ins. Co.*, 38 Misc. Rep. 318; *Frese v. Mutual Life Ins. Co.*, 11 Cal. App. 387; *Fountain v. Security Mutual L. Ins. Co.*, 93 S. E. Rep. 118; *Eagle v. N. Y. Life Ins. Co.*, 48 Ind. App. 284; *Wilson v. R. M. L. Ins. Co.*, 137 Iowa, 184; *Ruane v. M. L. I. Co.*, 186 S. W. Rep. 1188; *Cilek v. N. Y. Life Ins. Co.*, 95 Neb. 275; *Salig v. U. S. L. I. Co.*, 236 Penn. St. 460; *Mills v. National Life Ins. Co.*, 136 Tenn. 350.) The Appellate Division was in error in holding that the defendant had waived its right to cancel the policies without demand and notice. (*Fowler v. Met. Life Ins. Co.*, 116 N. Y. 389.) Payment of surplus to Stevens was no part of the cancellation. (*Lockwood v. N. Y. L. Ins. Co.*, 175 App. Div. 24; 223 N. Y. 714.)

Louis L. Babcock and *Robert S. Stevens* for respondents. All the acts performed by the defendant in the way of attempting to cancel the policy were ineffectual since the notices of cancellation and the checks were not even mailed prior to Mr. Stevens' death. (*Van Valkenburgh v. Lenox Fire Ins. Co.*, 51 N. Y. 465; *Tisdell v. N. H. F. Ins. Co.*, 155 N. Y. 163.) The evidence in the case shows that the appellant did not elect within a reasonable time to cancel the policies. On the contrary, it elected to continue the policies in force and communicated this intention to the insured. (*Modern Woodmen v. Vincent*, 40 Ind. App. 711; *G. F. Ins. Co. v. Michael*, 167 Ind. 659; *Croft v. New Zealand, etc., Co.*, 6 H. L. Cas. 705; *Bailey v. American Deposit Co.*, 52 App. Div. 402; 165 N. Y. 672; *Insurance Co. v. Norton*, 96 U. S. 234.)

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ANDREWS, J. On May 16, 1914, Frederick C. Stevens held five paid-up life policies issued by the Mutual Life Insurance Company. On that day he borrowed from the company \$1,837 on each policy and executed five notes in each promising to pay that sum and interest on January 24, 1915, and in each stating that he had deposited with and assigned to the company as collateral security one of such policies and agreeing that if he failed to repay the note or interest when due the company "without further notice and without further demand for payment may cancel said policy as of the date of default" and apply to the payment of the note and interest \$1,920, fixed as the cash surrender value of the policy, and pay the balance (if any) on demand to the parties entitled thereto. The notes also provided that upon request and upon the payment of interest the time for their payment might be extended for six months or one year. If that was done the same provisions for cancellation were applicable except that the amount fixed for the cash surrender value might be increased.

On January 24th, 1915, all interest was paid and the loan extended to January 24th, 1916. At some time, apparently prior to that date in view of the language used, five notices were sent to Mr. Stevens, each stating that the loan and interest would be payable on January 24th, and asking him, if he wished to continue the loan, to remit the interest. The notices also contained certain statements not applicable to paid-up policies. No attention was paid to these notices and no payments made. The company did not, however, at once cancel the policies. As thirty days' grace is allowed for the payment of premiums, its custom is said to be to allow the same privilege for the payment of interest and fifteen days in addition so as to enable it to hear from distant points and make certain that no payments have in fact been made. Instead on February 12th it wrote to Mr. Stevens on what were evidently forms relating to the

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non-payment of premiums that interest on each loan "will expire on January 24, 1916," and that it trusts he will remit "before that time * * * that the insurance may not lapse" the interest and forty-six cents which was evidently compound interest from January 24, 1916. It further stated that unless a remittance was received before the date of expiration, restoration of the insurance would be subject to certain conditions, and asked Mr. Stevens to give the matter his prompt attention. Still nothing was done and on February 28th five other letters were sent by the company. Like the last they were a clumsy attempt to adopt a form letter as to premiums to the circumstances surrounding the loans. They each notified Mr. Stevens that he had allowed his "policy to lapse" by default in the payment of interest. They then discussed matters in terms not appropriate to paid-up policies. But they say that a policy is too valuable an asset to be cast aside and ask Mr. Stevens to take up the matter of restoring those issued to him. Finally a note at the end distinctly gives the number of the policy referred to, states that it is paid up and that \$110.22 interest on a loan was due January 24th, 1916. Once more no notice was taken of these letters and on March 9th the company canceled each policy by pasting upon it a cancellation slip as of January 24th, 1916. On the 13th the company wrote him that each policy had been canceled because the loan had not been paid or renewed, gave a statement of the transaction and inclosed a check of \$28.78 on each policy, being the balance due. These letters and checks were forwarded to the defendant's agents at Washington and were there mailed to Mr. Stevens at his home in Attica, before his death, which occurred suddenly on the 14th. They were not received, however, until afterwards, and the checks were then returned to the company by his executors. These executors now claim that they are entitled to the face value of the paid-up policies less the amount due

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on the loans. To recover that amount this action is brought.

The trial court directed a verdict for the plaintiffs on the ground that the cancellation of the policies did not become effective until notice thereof reached Mr. Stevens and until he was either paid the balance due or was informed that the company held that sum subject to his demand. The Appellate Division did not adopt the reasoning of the trial judge but affirmed his action on the ground that the company had waived its right to cancel without further notice of such intention. We think the action cannot be maintained on either theory.

The contract is clear. Its terms are not ambiguous. On default, the company may cancel the policy without further notice or further demand. This cancellation is the basis for further action. After it, but necessarily only after it has been effected, the company applies the surrender value of the policy to the payment of the note. If any balance remains it will pay it to the borrower on demand. The provisions are independent. They do not resemble those in fire policies where the manner in which cancellation may be effected is prescribed. Here the borrower expressly agrees that the cancellation may be made without notice by the action of the company. Such an agreement is not illegal. (*Clare v. Mut. Life Insurance Company*, 201 N. Y. 492.) Nor is it inequitable. The borrower knows when the loan is due. He knows the privilege he has conferred. He knows it will generally be to the advantage of the company to enforce the cancellation. It is for him to ascertain if cancellation has been effected because of his default and if so to demand any balance that may be due to him. In most banking loans on collateral the bank reserves the right to sell the collateral on default or to retain it itself at a fair value and apply the proceeds on the loan. Any balance due belongs to the borrower. But it has never been held

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that the transaction is not closed until notice is given that such a balance is in its hands.

As we have said, the time of payment of the notes was extended until January 24th, 1916. The evidence of interest payments and the statements of plaintiffs' counsel show this fact beyond a doubt. If so, a mere delay of forty-five days in canceling the policy is immaterial. Nothing in the collateral note required the company to exercise its option to cancel on the very day it became due. The agreement expresses the contrary intent. The cancellation is to be made "as of the date of default." This implies action subsequent to that date. It is true the delay might be so great as to permit an inference of fact that the company had made an election not to cancel. Once made the insured might rely upon such election, and cancellation would require reasonable notice and demand. But such a delay as here occurred would not of itself permit such an inference.

Is there anything in the letters and notices that requires a different result? If the company extended indefinitely the time for the payment of the principal and interest, or if because of its actions the insured was justified in believing such an extension had been granted and failed to make required payments relying on such a belief, again no cancellation could be had without reasonable notice and demand.

The defendant does not appear to have knowingly and intentionally extended the time. Nor do the letters and notices justify a belief on the part of Mr. Stevens that such an extension had been granted. He was a business man and had been a banker. We must infer in him a reasonably intelligent appreciation of the meaning of them. The first simply informed him that his loan would become due on January 24th, 1916, and that some action on his part was required if it was to be extended. Certain provisions on the back of this paper,

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referring to loans on ordinary policies and to extensions of loans if premiums were promptly paid, he knew did not apply to him. From that of February 12th the most that he could infer was that although in default he might still be permitted, if he acted immediately, to pay his interest as of January 24th and so obtain an extension. The word "lapse" was inappropriate, but a business man, as was Mr. Stevens, could not have understood he was given an indefinite time within which to make his payments; and that good faith, therefore, required a further notice before cancellation was enforced. The letter of February 25th was entirely unfitted to the circumstances; but at least it was a clear notice that the policies were no longer in force and that further negotiations were required to restore them. Finally, there is no direct evidence that Mr. Stevens understood an extension was granted him and no facts appear from which the inference may be drawn either that he so believed or that he relied on such belief. The truth probably is that he intended to allow his policies to be canceled so as to pay his notes.

As we find no question of fact to be submitted to a jury the judgments of the Trial Term and of the Appellate Division should be reversed and the complaint dismissed, with costs in all courts.

HISCOCK, Ch. J., HOGAN, CARDOZO, McLAUGHLIN and ELKUS, JJ., concur; POUND, J., not voting.

Judgments reversed, etc.

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GERTRUDE M. BARNHART, as Administratrix of the Estate of JOHN A. BARNHART, Deceased, Appellant, *v.* THE AMERICAN CONCRETE STEEL COMPANY, Respondent.

Workmen's Compensation Law of New Jersey — master and servant — negligence — a servant, a resident of New Jersey, having, as permitted by the New Jersey statute, elected to accept the remedies provided thereby instead of the common-law remedies for injuries, his legal representative cannot maintain a common-law action for the death of such servant from injuries received while working in this state.

1. Under the Workmen's Compensation Law of New Jersey, if a servant prefers to retain his common-law remedies, he may give notice, within a certain time after his employment, and the remedies will be retained. If he chooses to renounce them in return for the statutory scheme of compensation, his voluntary choice is the source and origin of his right.

2. Where plaintiff's intestate, who, at the time of his death, was a resident of the state of New Jersey and in the employ of the defendant, a New Jersey corporation, had made and entered into the contract of employment in that state, but was at work for the defendant in this state at the time of his death, and had, under the New Jersey statute, giving him the right to accept or reject the statutory scheme of compensation, exercised the option to accept it and contracted accordingly, such contract became binding upon him and like any other valid contract enforceable in the state of New York, unless opposed to its public policy.

3. The right of action to recover for death, which is preserved by constitutional provision in this state (Art. 1, § 18), is the one provided for by section 1902 of the Code of Civil Procedure. That section authorizes the executor or administrator to maintain an action to recover damages for the wrongful killing of his decedent "against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued." The contract of employment made by plaintiff's intestate being one which would bar an action against defendant brought by himself, it is equally true that it bars an action by his personal representative, and the contract of employment being valid in New Jersey prevents the maintenance of an action for the recovery here sought in New York. (*Johnston v. Fargo*, 184 N. Y. 379, distinguished; *Colaizzi v. Pennsylvania R. R. Co.*, 208 N. Y. 275, followed.)

Barnhart v. American Concrete Steel Co., 181 App. Div. 881, affirmed.

(Argued December 10, 1919; decided January 6, 1920.)

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Points of counsel.

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APPEAL from a judgment, entered December 10, 1917, upon an order of the Appellate Division of the Supreme Court in the second judicial department, reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

Anthony J. Ernest for appellant. The New York Constitution (Art. 1, § 18) and the New York statutes give to the plaintiff the right to recover for pecuniary damages suffered by reason of the negligence of the defendant. Neither the New York Constitution (Art. 1, § 19, as amd.) nor any New York statute, properly construed, deprives the plaintiff of such right. The right to recover damages for a tort causing death is governed solely by the law of the place where the tort was committed. The contract of employment in New Jersey, amplified by the New Jersey Workmen's Compensation Act, properly construed, does not deprive the plaintiff of such right to recover for the pecuniary damages caused in New York by the negligence of the defendant. (*Mexico C. R. Co. v. Eckman*, 205 U. S. 538; *Mexican Railway v. Chantry*, 136 Fed. Rep. 315; Cooley on Torts [3d ed.], 909; Dicey on Conflict of Laws, Moore's notes, 659, 667; Minor's Conflict of Laws, § 202; *Coyne v. Southern Pacific Company*, 155 Fed. Rep. 683; *Phillips v. Eyre*, L. R. 6 Q. B. 1; *Matter of Doey v. Howland*, 224 N. Y. 30; *P. R., etc., Co. v. Schubert*, 224 U. S. 603.) The right of action (for death) was a property right of the beneficiaries to it. (*Meekin v. B. H. R. R. Co.*, 164 N. Y. 145; *Hamilton v. Erie R. R. Co.*, 219 N. Y. 354; *Matter of Meng*, 227 N. Y. 264; *Jacobus v. Colgate*, 217 N. Y. 243; *T. & P. R. Co. v. Rigsby*, 241 U. S. 33, 39; *Rosin v. Lidgewood*, 89 App. Div. 252; *T. & N. R. Co. v. Miller*, 221 U. S. 408.)

Theodore H. Lord and *Otto D. Parker* for respondent. The contract of employment entered into by the deceased

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with the appellant in the state of New Jersey conferred upon him the right to compensation under the Compensation Law of New Jersey, irrespective of any common-law liability, and by said contract the deceased for himself, his personal representatives and next of kin surrendered all right to any other method, form or amount of compensation than that provided by the Compensation Act for injuries sustained by accident arising out of and in the course of his employment, without regard to the state in which the accident occurred. (*Post v. Burger*, 216 N. Y. 544; *Shanahan v. Monarch Engineering Co.*, 219 N. Y. 469.)

McLAUGHLIN, J. This action was brought to recover damages alleged to have been sustained by the death of plaintiff's intestate. At the time of his death the intestate was a resident of New Jersey and in the employ of the defendant, a New Jersey corporation. The contract of employment was entered into in that state. At the time of his death he was at work for the defendant in the state of New York and the question presented is whether, by reason of that fact, the action can be here maintained.

The New Jersey Workmen's Compensation Act (Laws of 1911, chap. 95, as amended) provides that when an employer and employee shall, by agreement, either express or implied, accept the provisions of section 2 of the act, compensation for personal injuries to or for the death of such employee by accident arising out of or in the course of his employment, shall be made by the employer without regard to the negligence of the employee according to certain schedules set forth (Par. 7, sec. 2); that such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof, than that provided in section 2 of the act and an acceptance of all the provisions of section 2 shall bind the employee

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himself, and for compensation for his death shall bind his personal representatives, his widow and next of kin, as well as the employer (Par. 8); that every contract of hiring made subsequent to the time provided for any act to take effect shall be presumed to have been made with reference to the provisions of section 2, and unless there be as a part of such contract an express statement in writing prior to any accident, either in the contract itself or by written notice from either party to the other, that the provisions of section 2 are not intended to apply, then it shall be presumed that the parties have accepted the provisions of section 2 and have agreed to be bound thereby.

There is a fundamental difference between the Workmen's Compensation Act of New Jersey and the Workmen's Compensation Act of New York. This difference it is important to keep in mind. Under one statute the scheme of compensation is optional, while in the other it is mandatory.

In *Matter of Post v. Burger & Gohlke* (216 N. Y. 544) this court held, at least inferentially, that the remedy under the New York statute was contractual in its nature. The court, however, did not mean that it was contractual in the strict sense, as was pointed out in *Matter of Smith v. Heine Safety Boiler Co.* (224 N. Y. 9). Judge CARDENZO, who delivered the opinion, referring to *Matter of Post v. Burger & Gohlke* (*supra*), said: "Reading into the contract of employment the provisions of the statute, we held that a liability *quasi ex contractu* was imposed on the employer. Contractual in a strict sense, of course, the liability is not (*People ex rel. Dusenbury v. Speir*, 77 N. Y. 144; *Matter of Post v. Burger & Gohlke*, *supra*, at p. 549; *Ralli v. Troop*, 157 U. S. 386, 396; Angell, Recovery Under Workmen's Compensation Law for Injury Abroad, 31 Harvard Law Review, p. 619). If the parties were to agree that it should not attach, the courts would disregard their agreement." (p. 11.)

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The New Jersey statute is different. Under that statute the rights which it creates and the duties which it imposes are contractual in the strict sense. It is optional with the employer, as well as the employee, whether or not the compensation, in case of injury or death, shall be paid. If a servant prefers to retain his common-law remedies he may give notice, within a certain time after his employment, and the remedies will be retained. If he chooses to renounce them in return for the statutory scheme of compensation, his voluntary choice is the source and origin of his right.

The plaintiff's intestate having the right to accept or reject the statutory scheme of compensation, exercised the option to accept it and contracted accordingly with the defendant. Such contract became binding upon him and like any other valid contract, enforceable in the state of New York, unless opposed to its public policy.

It is contended by the appellant that the contract, even though binding upon the intestate, is not binding upon his representatives. This contention is based upon the constitutional provision of the state of New York (Art. 1, sec. 18) to the effect that the right of action to recover damages for death shall never be abrogated. The right of action which is preserved by this constitutional provision is the one provided for in section 1902 of the Code of Civil Procedure. That section provides that the executor or administrator may maintain an action to recover damages for the wrongful killing of his decedent "against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued." Would the defendant have been liable to the decedent if the latter had survived? If his contract of employment would bar an action by himself, it is equally true that it bars an action by his personal representatives. They have the same rights he had and no others. They stand in his place.

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This court held in *Kelliher v. N. Y. C. & H. R. R. Co.* (212 N. Y. 207) that where the decedent had permitted the Statute of Limitations to bar an action during his life, no action could, after his death, be maintained by his representatives.

The court also held in *Hodge v. Rutland R. R. Co.* (112 App. Div. 142; affd., 194 N. Y. 570) that where the decedent, in consideration of a free passage, had signed a contract relieving the carrier from liability for injuries caused by its negligence, his representatives were equally barred from maintaining an action to recover damages for his death.

And in *Anderson v. Erie R. R. Co.* (223 N. Y. 277) it was held that a release from liability for negligence given by plaintiff's intestate to defendant, in consideration of the reduced rate at which a railroad ticket was sold to him, prevented a recovery by his representatives.

I am of the opinion that the decedent, at the time of his death, did not have a right of action against the defendant. This must be so unless the contract which he made with it is so contrary to the public policy of the state of New York that the court should refuse to enforce it.

This court held in *Johnston v. Fargo* (184 N. Y. 379) that an agreement relieving the employer of all liability for negligent injuries to his employees was contrary to public policy and void. But it also held in *Colaizzi v. Pennsylvania R. R. Co.* (208 N. Y. 275) that an agreement, after an accident, to accept certain benefits in a relief fund in lieu of common-law remedies was valid and binding.

Is there any public policy of the state that would prohibit the enforcement of a contract made in New Jersey like the one here in question? I know of none. Indeed, shortly after this accident occurred, our own Workmen's Compensation Law took effect. Compensation laws of a similar character have been enacted in

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very many of the states. Even before the New York act was passed, the Constitution of the state was amended for the express purpose of permitting the legislature to enact it. (Art. 1, sec. 19.) Under such circumstances, I can see no analogy between this case and the case presented in *Johnston v. Fargo* (*supra*). This is not an attempt to relieve the employer from liability. It is nothing more than an attempt to establish a scale of compensation which shall give the employee a remedy for all injuries, whether due to negligence or not. There is no doubt that such a contract would bind the employer, and if so, no reason has been suggested why it ought not to bind the employee. If it did bind him, then at the moment of his death his common-law right of action had been barred, and being barred against him, it was barred also against his representatives. The contract of employment was valid in New Jersey, and being so, prevents the maintenance of an action for the recovery here sought in New York. (*Piatt v. Swift & Co.*, 188 Mo. App. 584; *Pendar v. H. & B. Americdn Machine Co.*, 35 R. I. 321.)

It follows that the judgment appealed from should be affirmed, with costs.

HISCOCK, Ch. J., HOGAN, CARDOZO, POUND, ANDREWS and ELKUS, JJ., concur.

Judgment affirmed.

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ALLEN H. STEM, Individually and as Surviving Partner of the Firm of REED & STEM, Respondent, v. WHITNEY WARREN et al., Composing the Firm of WARREN & WETMORE, Appellants, and WILLIAM J. REED, as Executor of CHARLES A. REED, Deceased, Respondent.

Partnership — agreement between two firms of architects to design and supervise construction of buildings for a railroad company, a certain member of one of the firms to be executive head — contract with railroad company in pursuance of such agreement — cancellation of contract by railroad company upon death of executive head of associated architects — right of surviving partners of deceased executive head to accounting and division of commissions earned under contract with railroad company.

1. A contract of partnership is dissolved by the death of one of the parties, whether entered into for a fixed time or not, and after his death the former partner cannot bind the estate of the decedent by new contracts; and although the partnership be expressly extended to executors, they could not be compelled to carry it on, and would be entitled to a dissolution and an account of the assets, subject to the liabilities of the firm incurred up to the time of dissolution.

2. Two firms of architects, preliminary to a contract with a railroad company for services in designing and constructing a railroad terminal station and buildings connected therewith, entered into an agreement that they would render the services and divide the compensation as firms and not as individuals. They also agreed that a member of the first contracting firm should be the executive head of the work. Subsequent to this agreement and in pursuance thereof said firms of architects entered into a contract with the railroad company for doing the work for which the company agreed to pay certain commissions on the actual final costs of the completed buildings, and in which contract the company reserved the right to terminate the employment at any time. Under this contract the work was carried on until the death of the executive head of the associated architects. After his death and upon solicitation of a member of the second firm of the associated architects, the railroad company terminated the then existing contract and made a contract with the last mentioned firm of architects to complete the architectural work for the railroad company. The plaintiff, who is the surviving member of the firm to which the executive head of the associated architects belonged,

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seeks in this action to recover from the other firm the proportionate amount that would have been received by his firm if the original contract had been carried out, also to recover for commissions earned by reason of the construction of a hotel built by the railroad company, for which preliminary plans had been prepared, although the work was not assigned until after the death of the executive head of the associated architects. *Held*, that, although the death of the executive head terminated the partnership between the firms, it was the duty of the survivors of the firms to take possession of the assets, perform the contract, extinguish the liabilities and close its business for the interest of all parties concerned, and the representatives of the deceased executive are entitled to share in the profits of all unfinished business though subsequently completed. *Held, further*, that although the preliminary plans for the proposed hotel had been prepared by the associated architects before the termination of the contract by the railroad company a "reasonable expectation" of securing a contract for the construction of the hotel was not an asset of the associated architects and hence the plaintiff is only entitled to an accounting and division of the commissions on the preliminary plans of the hotel.

Stem v. Warren, 185 App. Div. 823, modified.

(Argued October 8, 1919; decided January 13, 1920.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 10, 1919, modifying and affirming as modified an interlocutory judgment of Special Term directing an accounting.

The nature of the action, the facts, so far as material, and the questions certified are stated in the opinion.

John G. Milburn, Walter F. Taylor, Edwin De T. Bechtel and Gerald Hull Gray for appellants. The agreement between the associated architects was terminated by the death of Charles A. Reed. (3 Kent's Com. [10th ed.] 65; *Stewart v. Robinson*, 115 N. Y. 328; *Pemberton v. Hinchman*, 78 N. J. Eq. 270; *Hubert v. Aitkin*, 96 App. Div. 270; *Kennedy v. Porter*, 109 N. Y. 526; *Stewart v. Robinson*, 115 N. Y. 328; *Pemberton v. Oakes*, 6 L. T. Ch. 35; *Andrews v. Stinson*, 254 Ill. 111; *Hornaday*

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v. *Cowgill*, 54 Ind. App. 631; *Insley v. Shire*, 54 Kan. 793; *Mattison v. Farnham*, 44 Minn. 95; *McGrath v. Cowen*, 57 Ohio St. 385; *Wilcox v. Derickson*, 168 Penn. St. 331; *Burwell v. Mandeville*, 2 How. 560.) The agreement of the associated architects with the railroad company was terminated by the death of Reed and the termination of the partnership. (*Martine v. Int. Life Ins. Society*, 53 N. Y. 339; *Sargent v. McLeod*, 209 N. Y. 360; *Spalding v. Rosa*, 71 N. Y. 40; *Mason v. Secor*, 76 Hun 178; *Greenburg v. Early*, 4 Misc. Rep. 99; *Baxter v. Billings*, 83 Fed. Rep. 790; *Lacy v. Getman*, 119 N. Y. 109.) The firm of Warren & Wetmore is not to be held accountable to the plaintiff in this action or to Reed's estate for the profits made out of the completion of work unfinished at Mr. Reed's death. (*Williams v. Wheldon*, 109 N. Y. 332; *Costello v. Costello*, 209 N. Y. 252; *Martine v. Int. Life Ins. Socy.*, 53 N. Y. 339; *Spalding v. Rosa*, 71 N. Y. 40; *Justice v. Lairy*, 19 Ind. App. 272; *Lafferty v. Lafferty*, 174 Penn. St. 536; *Rice v. Angell*, 73 Tex. 350.)

Harold Swain for plaintiff, respondent. It is the duty of a surviving partner of a firm to complete its unfinished business, performing its contracts and closing up its business in the manner most advantageous to the interests of all the parties concerned. (Gilmore on Part. §§ 353, 354; *Murray v. Fox*, 39 Hun, 108; *Nehrboss v. Bliss*, 88 N. Y. 600; *Castle v. Marks*, 50 App. Div. 320; *King v. Leighton*, 100 N. Y. 386; *Kennedy v. Porter*, 109 N. Y. 526.) In completing the firm's unfinished business, not only is the surviving partner precluded from making an individual profit at the expense of the firm, but upon him is imposed the duty of completion of the unfinished business without personal recompense. (*Denver v. Roane*, 99 U. S. 355; *Consaul v. Cummings*, 222 U. S. 262.) A partner cannot extinguish a contract belonging to the partnership by the substitution of a new contract relating to the same subject-matter, in the profits of which he alone is to participate.

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In settling the accounts, such a new or substituted contract must be regarded as only a modification of the former contract, and the partner must account for the profits realized from the new or substituted contract. (*Little v. Caldwell*, 101 Cal. 553; *Andrews v. Haas*, 214 N. Y. 255; *Martin v. Camp*, 219 N. Y. 170; *Johnson v. Ravitch*, 113 App. Div. 810; *Tenney v. Berger*, 93 N. Y. 524; *Castle v. Marks*, 50 App. Div. 320; *Mitchell v. Reed*, 61 N. Y. 123; *Holbridge v. Gillespie*, 2 Johns. Ch. 30; *Physe v. Wardell*, 5 Paige, 268; *Clegg v. Edmondson*, 8 DeG., M. & G. 787; *Struthers v. Pearse*, 51 N. Y. 537; *Clegg v. Fishwick*, 1 McN. & G. 294; *Featherstonhough v. Fenwick*, 17 Ves. 298; *Spears v. Willis*, 151 N. Y. 443.) The agreement between the associated architects was not terminated by the death of Charles A. Reed. (Parsons on Part. [4th ed.] 432; *King v. Leighton*, 100 N. Y. 386.) In determining whether the defendants are to be held accountable for the profits made out of the prosecution of the joint enterprise, consideration should be given to the fact that the superseding contract, by its terms, placed the defendants in a position where their individual interests conflicted with their trust duties as surviving partners. (*Harrington v. Erie Co. Savings Bank*, 101 N. Y. 257; Parsons on Part. [4th ed.] 436; *Pyle v. Pyle*, 137 App. Div. 568; 199 N. Y. 538.) The relations of the parties with reference to the Hotel Biltmore were such that the defendants should be held accountable at least to the extent directed by the Appellate Division. (*Consaul v. Cummings*, 222 U. S. 262; *Marston v. Gould*, 69 N. Y. 220.)

Arthur I. Strang and *Clinton T. Taylor* for defendant, respondent. The agreement between the associated architects was not terminated by the death of Charles A. Reed. (*Matter of Marx*, 106 App. Div. 212.) The agreement between the railroad company and the associated architects expressly provides for the appointment of

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a successor in case of Mr. Reed's death. The railroad company had all the protection it needed by its distinct reservation of the right to cancel the contract at any time with or without cause. His death would be a cause for cancellation but did not of itself cancel the agreement. (*Lorillard v. Clyde*, 142 N. Y. 456; *Sargent v. McLeod*, 209 N. Y. 364.) The firm of Warren & Wetmore is accountable for the profits made out of the joint enterprise in so far as it related to any unfinished work which had been assigned to them prior to the death of Charles A. Reed. (*Selwyn & Co. v. Waller*, 212 N. Y. 507; *Kennedy v. Porter*, 109 N. Y. 526; *Castle v. Marx*, 50 App. Div. 320; *Griswold v. Waddington*, 16 Johns. 438; *Little v. Caldwell*, 101 Cal. 553; *United States v. U. S. Fidelity & Guaranty Co.*, 139 App. Div. 262; *Salisbury v. Brisbane*, 61 N. Y. 617; *Mitchell v. Reed*, 61 N. Y. 123; *Denver v. Roane*, 99 U. S. 355; *Consaul v. Cummings*, 222 U. S. 262; *Hasbrouck v. Marks*, 58 App. Div. 33; *Spiess v. Rosswog*, 63 How. Pr. 401; 96 N. Y. 651; *Tolen v. Carr*, 12 Daly, 520; *Spears v. Willis*, 69 Hun, 408; 151 N. Y. 443; *King v. Leighton*, 100 N. Y. 386.)

HOGAN, J. In the year 1902 the New York Central and Hudson River Railroad Company contemplated a proposed change in motive power from steam to electricity, the erection of a new terminal station and various other buildings in connection therewith in the city of New York.

The firms of Reed & Stem and Warren & Wetmore, architects, on February 8th, 1904, preliminary to a contract made with the New York Central railroad entered into an agreement which recited in substance that it was contemplated that the firms of Reed & Stem and Warren & Wetmore would secure a contract for architectural services in the construction of the Grand Central Station and buildings in connection therewith; that the firms named should join as associates for the purpose of

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completing plans and supervising the construction of said station and buildings in connection therewith; to share and share alike as firms and not as individuals the profits and losses; to devote their joint labor and talent to the work, properly to perform the same and to be jointly responsible to the railroad company for the proper and satisfactory carrying out of said work. The agreement also provided:

"Mr. Charles A. Reed, of the firm of Reed & Stem, is hereby named and mutually accepted as the executive head of the work. He shall have control of the work, and may hire and discharge all clerks, draftsmen and employees of the Association; and each of the members of the firms, parties hereto, will, to the best of his ability carry out the directions of said executive head. In event of a vacancy in the said position of executive head by resignation or otherwise, or upon the written request of the Railroad Company for a change in said executive head, the said Railroad Company shall have the right to determine, from time to time, as it may choose, which member of the firms, parties hereto, shall be the executive head, and the parties hereto are to abide by such determination.

"The executive head shall have entire control of the administration of the offices and affairs of the Association and shall be the Treasurer thereof."

On the same day a contract was entered into between the railroad company and the associated architects reciting the association of the firms named and agreement upon their part to jointly act as architects for the railroad company, to devote their joint labor and talent to the work which might be intrusted to them in such manner and to such extent as to adequately and properly perform all the work, and the said firms did covenant and agree to be jointly responsible to the railroad company for the proper and satisfactory performance of all the architectural work therein provided for. The division of com-

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pensation was left as a matter of agreement between the architects. The fourth paragraph of the agreement reads as follows:

"It is hereby covenanted and agreed by and between all the parties hereto that the said Charles A. Reed shall be, and he is hereby named and accepted by all the parties hereto as the executive head of the Architects. As between the railroad company and all contractors of the railroad company, the said Charles A. Reed and his successor or successors as such executive head, shall be the agent and representative of the architects in all matters provided for in this agreement. In case of the death, or in case of the resignation of the said Charles A. Reed, his successor or successors as such executive head, or in case the railroad company shall at any time be dissatisfied with said Charles A. Reed, his successor or successors as such executive head, the Railroad Company shall have the right to, and may at any time, and from time to time designate in writing which one of the architects shall be the executive head. Such designation in writing, delivered to any one of the architects shall be binding and conclusive upon all the parties hereto."

The railroad company covenanted to pay the following percentages on the actual final costs of the completed buildings: For preliminary plans, etc., 1%; for working plans, 2%; for supervision, 1%; a total of 4%.

By the sixth provision of the agreement the railroad company reserved the right which was agreed to by the associates to terminate the employment upon notice in writing. Then followed five several provisions as to the amount to be paid in certain contingencies in the event of a termination by the railroad company.

After the execution of the contract, the associated architects opened offices devoted exclusively to the work contemplated in the contract, and from the date of the contract, February 8th, 1904, to the date of the death of Mr. Reed, November 12th, 1911, the associated architects

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planned and supervised the construction of numerous buildings in connection with the Grand Central Station. Payment for services in a substantial sum was made to them for such services up to December 31st, 1911, and no controversy arises as to the earnings of the associated architects prior to that time.

Immediately following the death of Mr. Reed, to wit, on November 15th, 1911, Mr. Wetmore addressed a communication to Mr. Newman, the executive head of the Grand Central Terminal improvements, inclosing a proposed contract in substance the same as the contract hereinbefore referred to except that Warren & Wetmore were named as architects thereunder, and in the same letter called attention to the sixth clause of the earlier contract as to the right of the railroad company to terminate the same, suggesting that the existing contract be terminated as of November 15th.

The trial justice found as matter of fact that the letter of Mr. Wetmore was written without any suggestion on the part of the railroad company and without the knowledge or consent of plaintiff, the surviving partner of the firm of Reed & Stem, or any representative of the estate of Mr. Reed, and as a conclusion of law that the conduct of defendants was a breach of the trust incident to the partnership relation between the parties. Thereafter Mr. Newman, acting for the railroad company, gave notice of the cancellation of the existing contract under which the associated architects had acted to become effective December 31st, 1911, and a new contract was on December 19th, 1911, made between the railroad company and Warren & Wetmore to complete the architectural work.

The plaintiff individually and as surviving partner of the firm of Reed & Stem seeks in this action to recover from the firm of Warren & Wetmore the proportionate amount that would have been received by the firm of Reed & Stem if the original contract had been carried out,

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also to recover for commissions earned upon the construction of the Biltmore Hotel.

Four questions have been certified to this court by the Appellate Division, namely:

“ 1. Was the agreement between the associated architects terminated by the death of Charles A. Reed?

“ 2. By reason thereof was the obligation of the joint adventurers to the railroad company canceled?

“ 3. Are the firm of Warren & Wetmore to be held accountable to the plaintiff in this action for the profits made out of the prosecution of the joint enterprise, in so far as it related to unfinished work which had been assigned to them prior to the death of Charles A. Reed?

“ 4. Are the firm of Warren & Wetmore to be held accountable to the plaintiff in this action to the extent of three per cent or any other portion of the cost of the Biltmore Hotel?”

The first question certified involves the status of the joint adventurers and a determination of the legal relations existing between the parties upon the death of Mr. Reed.

“ It is a general rule that a contract of partnership is dissolved by the death of one of the parties, whether entered into for a fixed time or not, and that after his death the former partner cannot bind the estate of the decedent by new contracts; and although the partnership be expressly extended to executors, they could not be compelled to carry it on, and would be entitled to a dissolution and an account of the assets, subject to the liabilities of the firm incurred up to the time of dissolution.” (*Stewart v. Robinson*, 115 N. Y. 328, 333.)

By reason of the death of Mr. Reed, the partnership or joint venture between the firms of Reed & Stem and Warren & Wetmore was dissolved. The assets of such partnership became immediately vested in the survivors for the purpose of adjustment of the partnership affairs. (*Williams v. Whedon*, 109 N. Y. 333; *Costello v. Costello*, 209 N. Y. 252.) The most valuable asset of such part-

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nership was the contract between it and the railroad company. By the terms of such contract and the agreement between the associated architects the intention of the parties is manifest that the contract was to be performed notwithstanding the death of Mr. Reed if such event should occur. Upon the death of Mr. Reed it was the duty of the survivors of the firms to take possession of the firm's assets, perform the contract, extinguish the firm's liabilities, and close its business for the interest of all parties concerned, and the representatives of Reed were entitled to share in the profits of all unfinished business though subsequently completed. (*King v. Leighton*, 100 N. Y. 386, 393.)

The second question, in view of the conclusion we have reached upon the first question, must be answered in the negative. The general rule is that upon the death of one of several joint contractors before complete performance of the contract, the survivors are bound by the obligations of the contract and entitled to its benefits (*Babcock v. Farwell*, 245 Ill. 14), and as heretofore indicated the contract and agreement contemplated that the survivor should carry out the same with the railroad company.

The conclusions reached in what has been said with reference to questions numbered one and two result in a determination that the firm of Warren & Wetmore are to be held accountable to the plaintiff in this action for the profits made out of the prosecution of the joint enterprise in so far as it related to unfinished work which had been assigned to them prior to the death of Charles A. Reed, and thus the answer to question number three is in the affirmative.

An answer to the fourth question as to the liability of defendants to the extent of three per cent or any other proportion of the cost of the Biltmore Hotel requires a statement of the facts bearing upon that question.

In the spring of 1910 negotiations were in progress between one Baumann and the railroad company with

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reference to the construction of a hotel in connection with the terminal which had been in contemplation by the railroad company. Baumann at the outset was to contribute towards the expenses of the construction of the hotel. He had an architect who worked in conjunction with the associated architects in the preparation of tentative plans, arrangements having been made between such architects for a division of fees. Subsequently the railroad company undertook the construction of the hotel on its own account and thereafter the architect employed by Baumann ceased to have any connection with the associated architects. The associated architects during the years 1910 and 1911 prior to the death of Mr. Reed had prepared many plans and rendered a large amount of services in relation to the designing of the proposed hotel. At the time of Mr. Reed's death they had substantially completed so far as was necessary to form a basis of negotiations preliminary plans with reference to the hotel. February 12, 1912, the railroad company concluded to go ahead with the work on its own account and on the 11th day of March, 1912, it designated Warren & Wetmore to have charge of the work of preparing preliminary and working plans and specifications and supervising the construction of the hotel building. Their compensation was to be five per cent of the final cost of construction.

The preliminary plans were similar to and in many respects identical with the plans proposed by the associated architects and the plans prepared by the latter were used by the firm of Warren & Wetmore in the preparation of further plans. The hotel as finally constructed conformed substantially to the preliminary plans prepared by the associated architects prior to December 31, 1911, which date was the day of the accounting of the associated architects and was considered as equivalent to that of the death of Mr. Reed. The trial justice found that most of the basic features remained

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unaltered and the changes and departures from the preliminary plans of the building as finally completed were not greater or more substantial than usual and customary.

The justice further found that one of the important assets of the associated architects at the time of the death of Mr. Reed and on December 31, 1911, was their reasonable expectation of being formally chosen as the architects for the Hotel Biltmore.

Upon the facts stated and other facts found by the trial justice, he found as matter of law that the defendants by their failure to secure for the benefit of the associated architects a continuation of the architectural work and by their competing in their individual interests for the work, which as trustees for the associated architects they might have obtained, they violated their legal obligations as surviving partners and that the contract of the railroad company with Warren & Wetmore was an asset of the associated architects and that defendants be required to account for all profits and emoluments which they made or would make in connection with work done thereon.

The Appellate Division modified the findings of fact relating to the Hotel Biltmore by adding to the findings made that defendants used the preliminary plans prepared by the associated architects, and such plans and the work done by the associated architects in producing them were of great and substantial value in the preparation of the final plans, and the work of the defendants was merely a continuation of the business that the associated architects were engaged in on December 31st, 1911; further that the supervision and construction pursuant to the plans made by the associated architects and completed by defendants had to do with the construction of the Hotel Biltmore pursuant to the terms of the contract of February 15th, 1912. *

The Appellate Division modified the fourth conclusion of law by holding there should be excluded from the

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accounting all sums received by the defendants Warren & Wetmore in excess of three per cent of the cost of the completed building, the supervision of the construction thereof to be excluded from the scope of the accounting and treated as in the nature of new work not in behalf of the associated architects but for the account of the defendants.

The effect of this latter modification was that whereas Warren & Wetmore were to receive five per cent upon the entire cost, two per cent was first to be deducted as properly belonging to the defendants and three per cent to be divided between the associated architects, so that Warren & Wetmore should receive three and one-half per cent and the plaintiffs one and one-half per cent of the entire cost of the Hotel Biltmore.

The associated architects had been awarded no contract for the Hotel Biltmore at the time of the death of Mr. Reed. A "reasonable expectation" of securing a contract therefor was not an asset of the associated architects. By the terms of the contract between the railroad company and the associated architects the measure of compensation for preliminary plans was provided for at one per cent. Such preliminary plans having been made during the lifetime of Mr. Reed, under direction of the railroad company in connection with the erection of a building designated by it, were the property of the associated architects and Warren & Wetmore could not appropriate such plans, utilize the same and deprive their associates, Reed & Stem, or the plaintiff as survivor of such firm of the compensation earned by the associated architects in the preparation thereof, which was fixed under the terms of the contract between the railroad company and the associated architects at one per cent. The defendants should be required to account for the value of the preliminary plans upon the basis of the contract price thereof, to wit, one per cent; thus to the plaintiff herein one-half thereof should be awarded.

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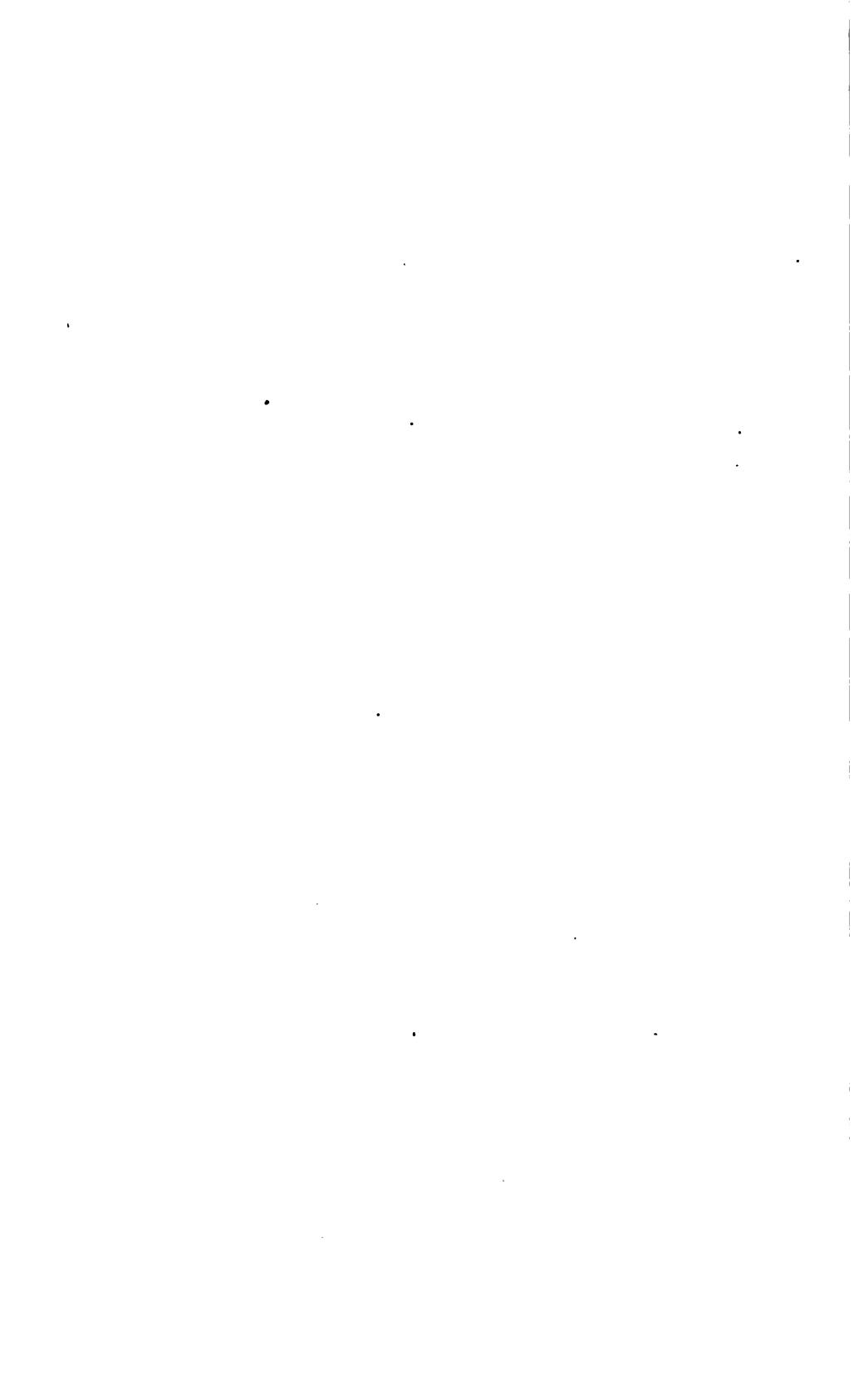
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The judgment should be modified by excluding from the accounting all sums received by the defendants Warren & Wetmore for services in connection with Hotel Biltmore in excess of one per cent of the cost of the completed building, and as thus modified affirmed, without costs to either party.

Questions certified are answered as follows: Question number one in the affirmative, number two in the negative, number three in the affirmative and number four in the affirmative.

HISCOCK, Ch. J., CHASE, COLLIN, POUND and CRANE, JJ., concur; McLAUGHLIN, J., not sitting.

Judgment accordingly.



MEMORANDA

OF

*DECISIONS RENDERED DURING THE PERIOD EMBRACED IN
THIS VOLUME.*

**GEORGE W. YOUNG, Respondent, v. UNITED STATES
MORTGAGE AND TRUST COMPANY, Appellant.**

Young v. U. S. Mortgage & Trust Co., 179 App. Div. 678, affirmed.
(Argued April 30, 1919; decided July 15, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 23, 1917, affirming a judgment in favor of plaintiff entered upon a verdict. The action was brought to recover the sum of \$158,260.51 on a contract alleged to have been made between the plaintiff and the defendant on June 22, 1899, by which the defendant, in consideration of the services to be rendered by the plaintiff to the defendant as its president, agreed to pay him in addition to his fixed salary, as president, a sum equal to five per cent of the net profits realized by the defendant on its business. The answer denied the alleged contract, as well as its performance by the plaintiff.

William D. Guthrie and Spotswood D. Bowers for appellant.

John C. Tomlinson, D-Cady Herrick and Austen G. Fox for respondent.

Judgment affirmed, with costs; no opinion.

Concur: COLLIN, CUDDEBACK, HOGAN, CRANE and ANDREWS, JJ. Not voting: CHASE, J. Not sitting: McLAUGHLIN, J.

In the Matter of the Claim of BRIDGET HART, Respondent, against WILSON & COMPANY, INC., et al., Appellants.

THE STATE INDUSTRIAL COMMISSION, Respondent.

Matter of Hart v. Wilson & Co., 186 App. Div. 926, affirmed.
(Argued May 20, 1919; decided July 15, 1919.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered November 25, 1918, unanimously affirming an award of the state industrial commission made under the Workmen's Compensation Law, for the death of claimant's husband as the result of tetanus. The decedent was a wool puller. There was evidence that he suffered from eczema of the hands. It was contended that the tetanus germ entered his system through the cracks in his skin causing his death.

E. C. Sherwood, William B. Davis and Amos H. Stephens for appellants.

Allan S. Locke for claimant, respondent.

Charles D. Newton, Attorney-General (E. C. Aiken of counsel), for State Industrial Commission, respondent.

Order affirmed, with costs; no opinion.

Concur: CUDDEBACK, CARDozo, POUND and CRANE, JJ.
Dissenting: HISCOCK, Ch. J., COLLIN and ANDREWS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. Thomas Abruzzo, Appellant.

(Argued May 26, 1919; decided July 15, 1919.)

APPEAL from a judgment of the Court of General Sessions of the Peace in the county of New York, rendered January 25, 1918, upon a verdict convicting the defendant of the crime of murder in the first degree.

George Gordon Battle and Lanman Crosby for appellant.

Edward Swann, District Attorney (Robert C. Taylor of counsel), for respondent.

Judgment of conviction affirmed; no opinion.
Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK,
HOGAN, McLAUGHLIN and CRANE, JJ.

ALVINA STAHLBERG, Respondent, *v.* THE PROTECTED HOME CIRCLE, Appellant.

Stahlberg v. Protected Home Circle, 178 App. Div. 948, affirmed.

(Argued May 26, 1919; decided July 15, 1919.)

APPEAL from a judgment, entered May 25, 1917, upon an order of the Appellate Division of the Supreme Court in the fourth judicial department, which reversed an order of the court at a Trial Term setting aside a verdict in favor of plaintiff and granting a new trial and directed judgment in favor of plaintiff upon said verdict. The action was to recover upon a certificate of benefit insurance. The defendant conceded that the insured died as a result of being run over by a freight train. It contended, however, that he committed suicide and that in such case the plaintiff would only be entitled to recover the amount of payments made with interest.

Adelbert Moot, A. W. Williams, Welles V. Moot and William G. Martin for appellant.

William Stearns and Carlton B. Livermore for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK,
HOGAN, McLAUGHLIN and CRANE, JJ.

ONONDAGA LITHOLITE COMPANY, Appellant, *v.* MICHAEL STAUB, Respondent.

Onondaga Litholite Co. v. Staub, 176 App. Div. 574, affirmed.

(Argued May 26, 1919; decided July 15, 1919.)

APPEAL from a judgment, entered March 16, 1917, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint. Plaintiff is a manufacturer of concrete stone. Defendant is a mason

builder. In June, 1914, defendant obtained a contract from the board of water supply of the city of New York for the construction of certain superstructures for the Ashokan bridge in Ulster county. Plaintiff claimed that defendant, through the agency of his son, had duly made a sub-contract with it for the concrete stone necessary in connection with the work to be done by defendant under said contract; that defendant had repudiated such alleged sub-contract and that plaintiff had sustained damages by way of expenses incurred and loss of profits, amounting to \$50,000. Defendant claimed that his son had made this contract without his knowledge or authority and refused to ratify it.

Jeremiah T. Mahoney and Vincent L. Leibell for appellant.

Charles I. Taylor and Thomas H. Beardsley for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN and CRANE, JJ.

DEXTER SULPHITE PULP AND PAPER COMPANY, Respondent, *v.* JEFFERSON POWER COMPANY, Appellant, Impleaded with Others.

Dexter Sulphite P. & P. Co. v. Jefferson Power Co., 179 App. Div. 332, affirmed.

(Argued May 27, 1919; decided July 15, 1919.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered August 6, 1917, affirming a judgment in favor of plaintiff entered upon the report of a referee. The action involved the water rights of the respective parties on the Black river in the village of Dexter. The complaint demanded judgment that the defendants and each of them be restrained and enjoined from drawing water so as to diminish the quantity to which the plaintiff is entitled, as alleged, and that the defendants be restrained from using any more water

than their respective grants conveyed. The answers of the defendants contained a general denial of the allegations of the complaint.

Edward N. Smith for appellant.

Elon R. Brown for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK,
HOGAN and McLAUGHLIN, JJ. Absent: CRANE, J.

LEE R. LIEBERT, Appellant, v. JOSEPH REISS, Respondent.

Liebert v. Reiss, 174 App. Div. 308, affirmed.

(Submitted May 27, 1919; decided July 15, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 16, 1916, upon the submission of a controversy, under section 1279 of the Code of Civil Procedure, as to the marketability of certain real property. On November 17, 1909, the Louis Abramson Contracting Company, a domestic corporation, while it was the owner of the property in question, executed and delivered to the State Bank a mortgage in the sum of \$10,250, which was duly recorded in the Kings county register's office. On July 5, 1911, a judgment was recovered against the said Louis Abramson Contracting Company by Frank Szemko and Joseph Gaydica, copartners doing business under the firm name and style of Szemko & Gaydica, for \$426.27, and the said judgment was duly docketed in the office of the clerk of Kings county on July 6, 1911. On or about September 27, 1911, an action was brought in the County Court of Kings county to foreclose the aforesaid mortgage against the Louis Abramson Contracting Company, and against Frank Szemko and Joseph Gaydica, as such copartners as aforesaid, and others. The said foreclosure action resulted in a judgment in favor of the plaintiff therein and a sale of the property pursuant thereto. The plaintiff derived her title to the said premises by mesne

conveyances through the referee's deed made pursuant to said judgment. In the aforesaid foreclosure action the summons was served only upon Frank Szemko, one of the members of the said copartnership, but was never served upon the other. The defendant herein successfully contended that the summons in the foreclosure action should have been served upon both members of the copartnership and that service upon one was ineffectual to foreclose the lien of the said judgment, or the rights of the other partner in the said property.

Joseph J. Schwartz for appellant.

No appearance for respondent.

Judgment affirmed, without costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK,
HOGAN and McLAUGHLIN, JJ. Absent: CRANE, J.

JOE GRIM, Appellant, *v.* LEHIGH VALLEY COAL COMPANY, Respondent.

Grim v. Lehigh Valley Coal Co., 171 App. Div. 493, affirmed.

(Argued May 27, 1919; decided July 15, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered February 28, 1916, reversing a judgment in favor of plaintiff entered upon a verdict and granting a new trial in an action under the Anthracite Mining Laws of the state of Pennsylvania, and also under the Employers' Liability Act of that state to recover damages for personal injuries claimed to have been sustained by the plaintiff through the negligence of the defendant in the coal mine of the defendant known as "Packer No. 2 Colliery" at Lost Creek, Penn. Plaintiff while cleaning a hole earlier prepared to receive a prop, or while inspecting the place preparatory to placing the prop, or just as he arrived at the place for that purpose was injured by a fall of rocks from the roof of the mine. The Appellate Division held that he could not recover since the injury was received while he was necessarily doing or about to do an act to eliminate the cause of the accident.

Samuel Seabury, Vine H. Smith and Stephen A. Machinski for appellant.

Edward W. Walker and William W. Green for respondent.

Order affirmed and judgment absolute ordered against appellant on stipulation, with costs in all courts; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK and HOGAN, JJ. Not sitting: McLAUGHLIN, J. Absent: CRANE, J.

LOUISE M. SCHONFELD, Appellant, *v.* **McMULLEN, SNARE & TRIEST, INC.**, Respondent.

Schonfeld v. McMullen, Snare & Triest, 173 App. Div. 969, affirmed.
(Submitted May 27, 1919; decided July 15, 1919.)

APPEAL from a judgment entered June 5, 1916, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant, a contractor engaged in building a portion of the subway in Lexington avenue in the city of New York. In the course of the work a temporary sidewalk of planks was laid. Plaintiff while walking thereon slipped and fell. The Appellate Division held that there was no sufficient evidence of defendant's negligence.

Raymond D. Fuller for appellant.

John R. Halsey for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK and HOGAN, JJ. Not sitting: McLAUGHLIN, J. Absent: CRANE, J.

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK, Appellant and Respondent, *v.* JOEL RATHBONE, Respondent and Appellant, Impleaded with Another.

Trustees of Columbia University v. Rathbone, 172 App. Div. 902, affirmed.

(Argued May 27, 1919; decided July 15, 1919.)

CROSS-APPEALS from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 11, 1917, modifying and affirming as modified a judgment in favor of plaintiff, entered upon an order of Special Term granting a motion for judgment on the pleadings. Plaintiff leased certain premises in the city of New York to a tenant who agreed in addition to money rental to pay taxes, assessments, etc. The tenant thereafter assigned the lease, with the consent of plaintiff, to the defendant, who assumed and became responsible for the full performance of the covenants and conditions of the lease. The complaint demanded judgment for the amount of rental, taxes and assessments accruing subsequent to the assignment and also for an amount of taxes which became a lien against the premises prior thereto but remained unpaid. The Appellate Division held that defendant was liable only for liabilities accruing after the assignment.

John B. Pine for plaintiff, appellant and respondent.

George Welwood Murray for defendant, respondent and appellant.

Judgment affirmed; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CUDDEBACK and CRANE, JJ. Not sitting: McLAUGHLIN, J.

THE PEOPLE OF THE STATE OF NEW YORK ex rel.
ANNA BUCKLEY, Appellant, v. SPRING VALLEY WATER
WORKS AND SUPPLY COMPANY, Respondent.

People ex rel. Buckley v. Spring Valley W. W. & S. Co., 186 App. Div. 905, appeal dismissed.

(Submitted May 28, 1919; decided July 15, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered November 15, 1918, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus made under section 81 of the Transportation Corporations Law to compel defendant to supply the relator's house with an adequate supply of water.

John J. Finn for appellant.

Henry L. de Forest for respondent.

Appeal dismissed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN and CRANE, JJ.

HENRY ROMEIKE, INC., Appellant, v. ALBERT ROMEIKE
& Co., INC., Respondent.

Romeike v. Romeike & Co., 179 App. Div. 712, affirmed.

(Argued May 28, 1919; decided July 15, 1919.)

APPEAL from a judgment, entered November 19, 1917, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. The action was to enjoin the defendant from using the name "Romeike" as part of its corporate name and from engaging in unfair and fraudulent competition with the plaintiff. The Appellate Division held that there was no evidence of any dishonest use by defendant of its corporate name, nor any resort to artifice or deceit to mislead the public or to cause confusion as to the identity of the respective businesses of plaintiff and defendant.

Harry D. Nims for appellant.

Henry Schoenherr for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK,
HOGAN, McLAUGHLIN and CRANE, JJ.

ROBERT O'MALLEY, Respondent, *v.* **ALBERT M. ZIMBRICH**, Appellant.

O'Malley v. Zimbrich, 173 App. Div. 957, affirmed.

(Argued May 28, 1919; decided July 15, 1919.)

APPEAL from a judgment, entered April 20, 1916, upon an order of the Appellate Division of the Supreme Court in the fourth judicial department, overruling defendant's exceptions, ordered to be heard in the first instance by the Appellate Division, denying a motion for a new trial and directing judgment in favor of plaintiff upon the verdict directed by the trial court. The action was brought to recover, pursuant to section 65 of the Personal Property Law, the installments paid by the plaintiff's assignor, Mary Green, toward the purchase price of an automobile sold to her by the defendant. The issue presented was the regularity of proceedings under which the defendant retook the automobile and sold it.

I. J. Beaudrias, Hugh J. O'Brien and Charles E. Bostwick for appellant.

Isaac Adler for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN and CRANE, JJ.

CLINTON D. RIEGEL, Appellant, *v.* **GEORGE H. LARNARD**, Respondent.

Riegel v. Larnard, 178 App. Div. 355, affirmed.

Submitted May 28, 1919; decided July 15, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered May 14, 1917, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by

the court at a Trial Term. The complaint alleged the conveyance to the plaintiff by defendant of certain premises by warranty deed and that part of the premises described was owned by a third party. The answer denied ownership or right of possession by other than plaintiff of any part of the premises described in the deed and set up as an affirmative defense that defendant did not own the plot in controversy at the time of the conveyance and that plaintiff had knowledge of such lack of ownership.

James O. Sebring and Charles C. Annabel for appellant.
Frank A. Bell for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN and CRANE, JJ.

CHARLES D. ARMSTRONG et al., Plaintiffs, v. CLAUDE H. WITT et al., Defendants, HARMON FARR et al., Appellants, and STATE BANK OF MAYVILLE, Respondent.

Armstrong v. State Bank, 177 App. Div. 265, affirmed.
(Argued May 29, 1919; decided July 15, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department entered March 24, 1917, affirming a judgment entered upon a decision of the court on trial at Special Term in an action to foreclose mechanics' liens against the defendant Witt & Blades, contractors with the state of New York, for the building of a county highway situate in Chautauqua county, known as part 5, county highway No. 1169. The plaintiffs instituted the action upon their lien. All other lienors (being all of the defendants, except the Bank of Mayville and Witt & Blades, the contractors) were made parties defendant as provided by statute. The State Bank of Mayville was also made a party defendant as it claimed by virtue of an assignment held by it as collateral to certain notes from the contractors all moneys due and to become due from the state to said contractors upon said contract amounting

to the sum of \$5,000 and interest. All of the defendant lienors appeared, answered and set up their respective liens which were all established and allowed upon the trial. The bank appeared and set up its alleged assignment as collateral to certain notes amounting to \$5,000. The court allowed the bank's claim and gave it priority over the defendants' liens. The question on appeal was whether such priority was justified.

Edward C. Schlenker, William G. Martin and Frederick C. Slee for appellants.

Wilson C. Price for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN and CRANE, JJ.

In the Matter of the Accounting of JOHN D. LYONS, as Administrator of the Estate of ANDREW DONNELLY, JR., Deceased, Appellant.

MARY DONNELLY, Respondent.

Matter of Lyons, 186 App. Div. 161, affirmed.

(Argued June 2, 1919; decided July 15, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered January 8, 1919, which modified and affirmed as modified a decree of the Sullivan County Surrogate's Court settling the accounts of the administrator of Andrew Donnelly, deceased. The Appellate Division disallowed an item of \$6,000, being a claim on a promissory note purported to have been made by decedent during his life to his wife for faithful service and attendance during her married life, and a claim of \$4,000 for compensation to the administrator.

Daniel J. Dugan and John D. Lyons for appellant.

Arthur C. Kyle and Russell Wiggins for respondent.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDENZO, POUND, McLAUGHLIN and ANDREWS, JJ.

JOSEPH DOBBINS, Respondent, *v.* DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Appellant.

Dobbins v. D., L. & W. R. R. Co., 177 App. Div. 132, affirmed.

(Submitted June 2, 1919; decided July 15, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered March 13, 1917, affirming a judgment in favor of plaintiff entered upon a verdict. Plaintiff loaded on defendant's cars and tendered for shipment some 27,000 pounds of cabbage together with a bill of lading. Defendant's agent wrote on the face of the bill of lading the words "More or less frozen when received." Later plaintiff returned the bill of lading to the station agent and demanded a bill of lading free from the words descriptive of the condition of the cabbage. The agent refused to give a clean bill. The plaintiff refused to accept the bill containing the indorsement and gave it back to the agent. Failing to accomplish the making of any contract of shipment, the plaintiff told the agent that he was compelled to throw the car over to the railroad company and let it take care of the cabbage loaded thereon. The railroad company thereafter shipped and sold the cabbage. This action was brought to recover its full value.

F. W. Thomson for appellant.

James F. Dougherty for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND and ANDREWS, JJ. Not sitting: McLAUGHLIN, J.

FRANK BICKLEMEYER, Appellant, *v.* LACKAWANNA STEEL COMPANY, Respondent.

Bicklemeyer v. Lackawanna Steel Co., 174 App. Div. 902, affirmed.

(Argued June 2, 1919; decided July 15, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department,

entered July 17, 1916, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action, under the Employers' Liability Act, to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant, his employer. Plaintiff's foot was injured by the falling thereon of a heavy iron casting. The complaint was dismissed on the ground that the accident resulted from the acts of fellow-servants for whose negligence defendant was not liable.

W. H. Ticknor for appellant.

Evan Hollister for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ.

FRANK C. KRUG, Appellant, *v.* HOMER D. BLISS,
Respondent.

Krug v. Bliss, 171 App. Div. 976, affirmed.

(Argued June 2, 1919; decided July 15, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 22, 1915, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term. The action was to recover accumulated penalties for alleged failure on the part of defendant, the treasurer of a corporation, to furnish plaintiff with a statement of the financial affairs of the corporation pursuant to a request served under section 69 of the Stock Corporation Law. The answer alleged that the corporation had gone out of existence and that defendant had no property to plaintiff's knowledge, of any kind belonging to it in his hands. Also, that plaintiff had been furnished with a statement of the affairs of said corporation.

James O. Sebring for appellant.

Walter N. Renwick for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, McLAUGHLIN and ANDREWS, JJ. Not sitting: POUND, J.

HARRY L. VOGL, Appellant, v. HARRY M. CHAMPLIN, Respondent.

Vogl v. Champlin, 175 App. Div. 965, affirmed.

(Argued June 2, 1919; decided July 15, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 18, 1916, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant, his employer. While working at a planer operated by steam power plaintiff's hand was caught between the rollers resulting in its loss. It was alleged that defendant was negligent in that he did not provide the plaintiff with a safe place to work; that he did not provide the plaintiff with a sufficient number of competent and experienced fellow-servants; that he did not keep the machinery in his factory free from defects; that he failed and neglected to comply with the laws of the state of New York enacted and concerning the safety of the plaintiff and his other employees, while working in the factory. The answer contained a general denial and a defense of contributory negligence.

James O. Sebring for appellant.

Monroe Wheeler for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ.

MOE SCHWARZ, as Executor of ISIDOR FREY, Deceased,
Respondent, v. E. REGENSBURG & SONS, Appellant.

Frey v. Regensburg, 173 App. Div. 967, affirmed.

(Argued June 2, 1919; decided July 15, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 26, 1916, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court. The complaint alleged a contract by which, in consideration of the plaintiff's testator's agreement to retire from defendant's employ, to refrain from soliciting orders from any of his customers or trade, and to refrain from entering into the same line of business as the defendant's, from competing with the defendant and from obtaining any of the defendant's trade or customers or selling any merchandise similar to the defendant's, the defendant agreed to pay the plaintiff's testator \$5,000 per year for the period of his life in equal weekly installments. The action was brought by the original plaintiff and on his death continued by the present plaintiff as executor to recover the weekly installments for the period from February 22, 1913, up to and including May 16, 1914, amounting to \$6,250.40. The complaint also alleged the recovery and existence of a judgment in favor of the original plaintiff on this same contract for the installments up to and including February 15, 1913. The defense here was that by suing specifically for definite earlier installments, plaintiff is barred from now claiming later installments.

Edmund L. Mooney and Martin Paskus for appellant.

Joseph M. Proskauer and Charles F. Bailey for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ.

THE B. & C. ELECTRICAL CONSTRUCTION COMPANY,
Respondent, *v.* WILLIAM H. OWEN, Appellant.

B. & C. El. Const. Co. v. Owen, 176 App. Div. 399, affirmed.

(Argued June 2, 1919; decided July 15, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 19, 1917, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. This suit was brought by the B. & C. Electrical Construction Company, a corporation, for the purpose of having delivered up for cancellation sixteen shares of its stock alleged to have been issued fraudulently and without consideration. The answer denied the allegations of fraud and want of consideration, and pleaded the Statute of Limitations.

William A. Buckner for appellant.

James Coupe and Henry F. Coupe for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ.

WILLIAM K. JENNE, Respondent, *v.* FRANKLIN'S INCORPORATED, Appellant.

Jenne v. Franklin's Incorporated, 177 App. Div. 950, affirmed.

(Argued June 3, 1919; decided July 15, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 31, 1917, affirming a judgment in favor of plaintiff entered upon a verdict. The action was to recover money alleged to have been advanced by plaintiff to defendant under an agreement for repayment on December 14, 1914. The defendant, in its answer, admitted that it received for its use and benefit, at the times stated, the sums respectively mentioned in the complaint, and that, although demanded, no part of said sums has been repaid except the interest as alleged, and denied any agreement to repay said sums on December 14, 1914, but alleged that plaintiff, in consideration of the

money advanced, had received notes of the defendant which were not due until September 14, 1915.

William H. Griffin and *George D. Zahm* for appellant.
A. M. Mills and *Arleigh D. Richardson* for respondent.
Judgment affirmed, with costs; no opinion.
Concur: **HISCOCK**, Ch. J., **COLLIN**, **CUDDEBACK**, **CARDOZO**, **POUND**, **McLAUGHLIN** and **ANDREWS**, JJ.

THOMAS TUNNEY, Respondent, *v.* **EMPIRE STATE LIQUOR COMPANY**, Appellant.

Tunney v. Empire State Liquor Co., 177 App. Div. 949, affirmed.
(Argued June 3, 1919; decided July 15, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 22, 1917, affirming a judgment in favor of plaintiff entered upon a verdict. Plaintiff purchased five shares of the capital stock of the defendant company and gave his check therefor for \$500. This action is brought to recover back the \$500 under an alleged agreement, partly oral and partly in writing, by the terms of which it is claimed that the defendant corporation agreed to refund the cost of the stock should plaintiff think at any time that the enterprise and the character of defendant's goods did not come up to his expectations.

Thomas F. Rogers for appellant.
James O. Sebring and *Justin V. Purcell* for respondent.
Judgment affirmed, with costs; no opinion.
Concur: **HISCOCK**, Ch. J., **COLLIN**, **CUDDEBACK**, **CARDOZO**, **POUND**, **McLAUGHLIN** and **ANDREWS**, JJ.

PAUL MARKOVICH, SR., as Administrator of the Estate of **ELEANOR MARKOVICH**, Deceased, Appellant, *v.* **BUFFALO AND LAKE ERIE TRACTION COMPANY**, Respondent.

Markovich v. Buffalo & Lake Erie Traction Co., 170 App. Div. 930, affirmed.
(Argued June 3, 1919; decided July 15, 1919.)

APPEAL from a judgment entered August 2, 1915, upon an order of the Appellate Division of the Supreme Court

in the fourth judicial department, reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint in an action to recover for the death of plaintiff's intestate alleged to have been occasioned through the negligence of defendant. The intestate was struck and killed by one of defendant's cars while she was crossing its tracks on Ridge road in the city of Lackawanna. The Appellate Division held that "the evidence shows affirmatively that the plaintiff's intestate was negligent as matter of law."

Preston M. Albro and *John W. O'Connor* for appellant.

Lyman M. Bass for respondent.

Judgment affirmed, with costs; no opinion.

Concur: **HISCOCK**, Ch. J., **COLLIN**, **CUDDEBACK**, **CARDOZO**, **POUND**, **McLAUGHLIN** and **ANDREWS**, JJ.

ELIZABETH FRENCH, Appellant, *v.* **BENJAMIN F. FRENCH**, Respondent.

French v. French, 171 App. Div. 891, affirmed.

(Submitted June 3, 1919; decided July 15, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 24, 1915, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term. The action was to procure an annulment of marriage upon the ground that the defendant had another wife living and that an alleged decree of divorce procured by her was null and void for lack of jurisdiction.

Morris Cohn, Jr., and *Basil Robillard* for appellant.

Andrew Macrery and *Louis S. Posner* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: **HISCOCK**, Ch. J., **COLLIN**, **CUDDEBACK**, **CARDOZO**, **POUND**, **McLAUGHLIN** and **ANDREWS**, JJ.

ERASTUS W. SEAMAN, Appellant, v. THE CITY OF NEW YORK, Respondent.

Seaman v. City of New York, 176 App. Div. 608, affirmed.

(Submitted June 4, 1919; decided July 15, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered November 17, 1916, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term. The action was for an injunction and damages, and to restrain the defendant from casting untreated sewage into Paerdegat basin in Jamaica bay in such quantities and in such an untreated condition that it contaminated and befouled plaintiff's premises and the portions thereof used in his business of oyster culture, and polluted the water of the bay, and especially of Indian creek, upon which his premises are situated, with human fecal matter and house sewage, to such an extent that it was totally unfit for use in the cultivation and storage of oysters and had resulted in the condemnation of these waters for that purpose by the board of health, and in great loss and damage to plaintiff's business and to the usable value of his premises for that purpose.

Ralph G. Barclay for appellant.

William P. Burr, Corporation Counsel (*William B. Carswell* of counsel), for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ.

HILDRED K. TALLMAN et al., Respondents, v. CHARLES WYAND et al., Appellants.

Tallman v. Wyand, 179 App. Div. 958, affirmed.

(Argued June 4, 1919; decided July 15, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 10, 1917, modifying and affirming, as

modified, a judgment in favor of plaintiffs entered upon a decision of the court on trial at an Equity Term. This action was brought to restrain the continuance of the erection of a Boston flat on lot No. 17 in the Roeser subdivision of the Carthage tract in the northeastern part of the city of Rochester, the title to which lot at the time of the trial herein appeared from the records to be in the defendant Wyand, and to restrain the defendants Roeser, the common grantors of all the lots therein, from erecting Boston flats, or double houses, and from otherwise violating certain verbal agreements made with the plaintiffs at the time they purchased their respective lots in that tract.

Frederick Wiedman and Horace G. Pierce for appellants.
George J. Skivington for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ.

JOSEPH M. EGLOFF, Appellant, *v.* EDWARD C. TANGER,
Respondent.

Egluff v. Tanger, 178 App. Div. 908, affirmed.

(Argued June 4, 1919; decided July 15, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered April 5, 1917, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at an Equity Term. The complaint alleged in substance that the defendant wrongfully embezzled and converted to his own use the proceeds of certain checks of the defunct corporation amounting to the aggregate sum of \$5,492.85, the specific charge being that the defendant, respondent, while acting in a fiduciary capacity as an employee of the corporation, caused such checks, which had been signed by Mr. Hershey, as the president of the corporation, but left blank as to dates, payees and amounts, and left with the

bookkeeper to be used for the proper purposes of the corporation, to be filled in for the aggregate amount stated, made payable to him and that he wrongfully and without the knowledge of the proper officials of the corporation procured the money of the corporation thereon. The answer admitted that the defendant had received the proceeds of divers checks signed in blank by said Hershey, and dated and filled in for divers amounts to defendant's order by the bookkeeper of the corporation, but denied that such checks were so delivered without the knowledge or consent of the corporation, or its officers, and that the defendant wrongfully appropriated any of the moneys derived therefrom.

Sardius D. Bentley for appellant.

Herbert J. Stull for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDODOZO, POUND, McLAUGHLIN and ANDREWS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel.
AMERICAN BROOM AND BRUSH COMPANY, Appellant,
v. WALTER H. KNAPP et al., Constituting the STATE
TAX COMMISSION, Respondents.

People ex rel. American B. & B. Co. v. Knapp, 187 App. Div. 89.
affirmed.

(Argued June 5, 1919; decided July 15, 1919.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered April 14, 1919, which confirmed, on certiorari, a determination of the state tax commission assessing a franchise tax against the relator under chapter 726 of the Laws of 1917.

Elon R. Brown and *Edward H. Letchworth* for appellant.

Charles D. Newton, Attorney-General (*C. T. Dawes* of counsel), for respondent.

Order affirmed, with costs, on opinion of COLLIN, J., in *People ex rel. Barcalo Mfg. Co. v. Knapp* (227 N. Y. 64).

Concur: COLLIN, CUDDEBACK, CARDZOZO, POUND and McLAUGHLIN, JJ. Dissenting: HISCOCK, Ch. J., and ANDREWS, J.

ANNIE GOLDSTEIN, Appellant, v. NEW YORK LIFE INSURANCE COMPANY, Respondent.

Goldstein v. N. Y. Life Ins. Co., 176 App. Div. 813, affirmed.
(Submitted June 6, 1919; decided July 15, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered February 14, 1917, which affirmed an order of the court at a Trial Term setting aside a verdict in favor of plaintiff and granting a motion for a new trial. The action was to recover upon two policies of life insurance. The defense was that the policies were procured through fraudulent statements of the insured to the defendant's examining physician as to his condition of health.

Morris E. Gossett for appellant.

James H. McIntosh and *Louis H. Cooke* for respondent.

Order affirmed and judgment absolute ordered against appellant on the stipulation, with costs in all courts; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK and McLAUGHLIN, JJ. Dissenting: CARDZOZO, POUND and ANDREWS, JJ.

In the Matter of the Claims of HAROLD S. BRIGHAM et al., Respondents, against THE CITY OF NEW YORK, Appellant.

Appeal — unanimous affirmance by Appellate Division of order confirming report of commissioners in proceedings by city of New York, under chapter 724 of Laws of 1905, to acquire lands for water supply purposes, not appealable, without permission, to Court of Appeals.

The amendment to section 190 of the Code of Civil Procedure (L. 1917, ch. 290) now regulates the practice on all appeals from judgments or orders and in effect supersedes and repeals special provisions of statutes permitting appeals in particular cases. Section 22 of chapter 724 of the Laws of 1905, which provides that, in a pro-

ceeding by the city of New York to acquire land for its additional water supply, an appeal may be taken, must, therefore, be deemed repealed in so far as it permits an appeal to the Court of Appeals, without permission, from an unanimous affirmation of an order finally determining such proceeding.

Matter of Brigham v. City of New York, 185 App. Div. 917, appeal dismissed.

(Submitted February 24, 1919; decided July 15, 1919.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the third judicial department, which unanimously affirmed an order of Special Term confirming the report of commissioners in a proceeding under section 42 of chapter 724 of the Laws of 1905, as amended by section 9 of chapter 314 of the Laws of 1906.

William D. Brinnier and Palmer Canfield, Jr., for motion.

William P. Burr, Corporation Counsel (*William McMurtrie Speer* of counsel), opposed.

Per Curiam. Chapter 724 of the Laws of 1905 provides for the acquisition by the city of New York of lands and interests therein for the construction of the necessary reservoirs and appurtenances for an additional water supply. From the confirmation of the report of the commissioners, appointed to assess damage, an appeal is allowed by section 22 which reads as follows: “ * * * but from any determination of the special term an appeal may be taken to the appellate division and from any determination of the appellate division, either party, if aggrieved, may take an appeal which shall be heard and determined by the court of appeals.”

This act was amended by the following laws without any change, however, being made in section 22:

Chapter 314, Laws of 1906, amending sections 3, 11, 13, 17, 31, 35, 37, 41 and 42; chapter 438, Laws of 1907, amending section 33; chapter 478, Laws of 1914, adding new section 35a; chapter 527, Laws of 1916, amending sections 11 and 42; chapter 601, Laws of 1916, amending section 40.

On June 1, 1917, chapter 290 of the Laws of 1917 went

into effect, amending section 190 of the Code of Civil Procedure regarding the jurisdiction of the Court of Appeals. It reads: "From and after the 31st day of May, 1917, the jurisdiction of the court of appeals shall, in civil actions and proceedings, be confined to the review upon appeal of an actual determination made by an appellate division of the supreme court in either of the following cases *and no others.*"

The instances in which an appeal may be taken as matter of right are then specified. No appeal, however, is allowed from an unanimous affirmation by the Appellate Division finally determining an action or special proceeding not appealable as matter of right unless the Appellate Division shall certify that, in its opinion, a question of law is involved which ought to be reviewed by the Court of Appeals or where in case of the refusal so to certify, an appeal is allowed by this court.

This amendment to section 190 of the Code of Civil Procedure now regulates the practice on all appeals from judgments or orders and in effect supersedes and repeals special provisions like those contained in section 22 of chapter 724 of the Laws of 1905, referred to above. Where a later act covers the whole subject of earlier acts, together with new provisions, and plainly shows that it was intended not only as a substitute for the earlier acts, but to cover the whole subject, then considered by the legislature and to prescribe the only rules in respect thereto, it will operate as a repeal of all former statutes relating to such subject-matter even if such former acts are not in all respects repugnant to the new act. (*City of Buffalo v. Lewis*, 192 N. Y. 193; *People v. Jaehne*, 103 N. Y. 184, 194; *King v. Cornell*, 106 U. S. 395.)

This motion is made to dismiss the appeal of the city of New York taken from a judgment of affirmation entered September 26, 1918. The decision of the Appellate Division was unanimous and it is stated in the moving papers that no application has been made to that court for leave to appeal. The appellant states that many like appeals are pending and that a decision in the

Van Etten case about to be argued in this court will be decisive of all points involved. It will be noticed that in the *Van Etten* case the Appellate Division allowed an appeal in accordance with section 190. No such allowance has been made in this case and the time to apply for leave to appeal has expired. The motion, therefore, to dismiss the appeal is granted, with costs.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

THEODORE L. EARLE, Appellant, v. HESTER R. EARLE et al., Respondents.

Reported below, 183 App. Div. 938.

(Argued September 29, 1919; decided October 7, 1919.)

MOTION for leave to withdraw an appeal from an order of the Appellate Division of the Supreme Court in the second judicial department, entered April 5, 1918, reversing an interlocutory judgment in favor of plaintiff and granting a new trial in an action for absolute divorce.

Richard T. Greene for motion.

Walter C. Sheppard opposed.

Motion granted on condition that within ten days appellant pay to respondent costs of appeal and ten dollars costs of motion; otherwise, motion denied, with ten dollars costs.

In the Matter of the Application of the PEOPLE OF THE STATE OF NEW YORK, by JESSE S. PHILLIPS, as Superintendent of Insurance of the State of New York, Respondent, for an Order to Take Possession of the Property and Conduct the Business of THE UNITED STATES GRAND LODGE OF THE INDEPENDENT ORDER SONS OF BENJAMIN.

Matter of People, by Phillips, v. U. S. Grand Lodge, I. O. S. B., 187 App. Div. 890, appeal dismissed.

(Submitted September 29, 1919; decided October 7, 1919.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the first

judicial department, entered February 3, 1919, which affirmed an order of Special Term directing the state superintendent of insurance to take possession of the property and conduct the business of the United States Grand Lodge of the Independent Order Sons of Benjamin.

The motion was made upon the ground of failure to file the required undertaking and the return on appeal.

Charles D. Newton, Attorney-General (Robert S. Conklin of counsel), for motion.

No one opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

**NORTHERN WESTCHESTER LIGHTING COMPANY, Appellant,
v. THE PRESIDENT AND TRUSTEES OF THE VILLAGE
OF OSSINING, Respondent.**

Northern Westchester Lighting Co. v. Vil. of Ossining, 179 App. Div. 135, appeal dismissed.

(Argued September 29, 1919; decided October 7, 1919.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 25, 1917, reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and granting a new trial.

The motion was made upon the ground that the Court of Appeals had no jurisdiction to entertain the appeal, the reversal by the Appellate Division having been on the facts.

Thomas G. Barnes for motion.

Joseph A. Greene opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

EMILE ABT, Doing Business as EMILE ABT & Co., Respondent, v. JULIUS KLUGMAN, Appellant.

Abt v. Klugman, 186 App. Div. 948, appeal dismissed.

(Argued September 29, 1919; decided October 7, 1919.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 31, 1918, unanimously affirming a judgment in favor of plaintiff entered upon a verdict directed by the court at a Trial Term.

The motion was made upon the ground that an appeal did not lie to the Court of Appeals as a matter of right and that permission to appeal had not been obtained.

Cecile Iselin for motion.

Benjamin Berger opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

LOUIS FEINSTEIN et al., Appellants, v. MASSACHUSETTS BONDING AND INSURANCE COMPANY, Respondent.

Reported below, 184 App. Div. 233.

(Argued September 29, 1919; decided October 7, 1919.)

MOTION to dismiss an appeal from a judgment entered July 17, 1918, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiffs entered upon a verdict and directing a dismissal of the complaint.

The motion was made upon the ground of failure to prosecute the appeal.

Joseph L. Prager for motion.

Alfred B. Nathan opposed.

Motion denied, with ten dollars costs.

THE TRI-BULLION SMELTING AND DEVELOPMENT COMPANY, Respondent, v. JOHN B. CORLISS et al., Defendants, and ALLEN CURTIS et al., Appellants.

Reported below, 186 App. Div. 613.

(Argued September 29, 1919; decided October 7, 1919.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 8, 1919, modifying and affirming as modified a judgment in favor of plaintiff entered upon a verdict.

The motion was made upon the ground that the Court of Appeals had no jurisdiction to entertain the appeal and upon the further ground that no undertaking had been filed with the second notice of appeal.

Holmes V. M. Dennis, Jr., for motion.

Richard T. Greene opposed.

Motion granted, without costs, unless within ten days appellants file and serve undertaking necessary to perfect appeal under second notice, in which case motion is denied, without costs.

ANNIE O. CARRIER, Appellant, v. CASSIUS M. CARRIER et al., Respondents, and FRANCES E. CARRIER, Appellant.

(Submitted September 29, 1919; decided October 7, 1919.)

MOTION to amend remittitur. (See 226 N. Y. 114.)

Motion granted, remittitur recalled and amended so as to allow separate bills of costs in this court and in Appellate Division to plaintiff and guardian ad litem payable out of estate.

MARGARET D. FORT, as Administratrix of the Estate of FRANK A. FORT, Deceased, et al., Respondents, v. THE GLOBE AND RUTGERS FIRE INSURANCE COMPANY, Appellant.

Fort v. Globe & Rutgers Fire Ins. Co., 186 App. Div. 185, appeal dismissed.

(Submitted September 29, 1919; decided October 7, 1919.)

MOTION to dismiss appeal from a judgment of the Appellate Division of the Supreme Court in the third

judicial department, entered January 20, 1919, unanimously affirming a judgment in favor of plaintiffs, entered upon a decision of the court at a Trial Term without a jury.

The motion was made upon the ground that the notice of appeal and undertaking were not served on the respondents within thirty days after leave to appeal had been granted by this court.

Joseph A. Murphy for motion.

Michael H. Cardozo, Jr., opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

MAUDE L. CARY, Respondent, *v.* TOWN OF SCPIO, Defendant, and CAYUGA SOUTHERN TELEPHONE COMPANY, Appellant.

Reported below, 184 App. Div. 927.

(Submitted September 29, 1919; decided October 7, 1919.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 24, 1918, reversing a judgment in favor of defendant telephone company entered upon a dismissal of the complaint by the court at a Trial Term and granting a new trial.

The motion was made upon the ground that the Court of Appeals had no jurisdiction to entertain the appeal.

James J. Hosmer for motion.

H. D. Bailey opposed.

Motion denied, with ten dollars costs.

FREDERICO ZUNINO, Appellant, *v.* PARODI CIGAR COMPANY, INCORPORATED, Respondent.

Reported below, 186 App. Div. 506; 188 App. Div. 955.

(Argued September 29, 1919; decided October 7, 1919.)

MOTION to dismiss an appeal from a judgment entered July 25, 1919, upon an order of the Appellate Division of the Supreme Court in the first judicial department,

which reversed an order of the court at a Trial Term setting aside a verdict in favor of plaintiff and granting a new trial and reinstated said verdict. Also motion to dismiss appeal from an order of said Appellate Division, entered June 7, 1919, which affirmed an order of Special Term denying plaintiff's motion to set aside the verdict and for a new trial.

The motion was made upon the ground that permission to appeal had not been obtained.

Samuel F. Frank for motion.

John B. Doyle opposed.

Motion denied, with ten dollars costs.

WILLIAM M. ALBERTI, Respondent, *v.* OTTO HEINEMAN,
Appellant.

Reported below, 187 App. Div. 466.

(Argued September 29, 1919; decided October 7, 1919.)

MOTION to dismiss an appeal from a judgment entered May 14, 1919, upon an order of the Appellate Division of the Supreme Court in the first judicial department, which reversed an order of the court at a Trial Term setting aside a verdict in favor of plaintiff, and dismissing the complaint and reinstated said verdict.

The motion was made upon the ground that the Appellate Division had unanimously decided that the verdict was supported by the evidence; that no questions of law were involved; that the exceptions were frivolous; that permission to appeal had not been obtained.

George P. Breckenridge for motion.

Mortimer Lanzit opposed.

Motion denied, with ten dollars costs.

BECKIE COHEN, as Administratrix of the Estate of BENJAMIN COHEN, Deceased, Respondent, *v.* NEW YORK, ONTARIO AND WESTERN RAILWAY COMPANY, Appellant.

Reported below, 187 App. Div. 934.

(Submitted September 29, 1919; decided October 7, 1919.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 17, 1919, modifying and affirming as modified a judgment in favor of plaintiff entered upon a verdict.

The motion was made upon the grounds that the appeal was frivolous and taken for purposes of delay only.

Lewis A. Rosen for motion.

John Bright opposed.

Motion denied, with ten dollars costs.

In the Matter of the Transfer Tax upon the Estate of CHARLES W. WATSON, Deceased.

THE COMPTROLLER OF THE STATE OF NEW YORK, Appellant; ANNA H. WATSON et al., as Executors, Respondents.

(Submitted September 29, 1919; decided October 7, 1919.)

Motion for re-argument denied, with ten dollars costs and necessary printing disbursements. (See 226 N. Y. 384.)

In the Matter of Proving the Will of CATHERINE A. TONE, Deceased.

MARY F. TONE, Appellant; JOSEPH H. McMAHON, Respondent.

(Submitted September 29, 1919; decided October 7, 1919.)

Motion to amend remittitur denied, without costs, on the ground that the surrogate has jurisdiction under section 2748 of the Code of Civil Procedure to allow compensation. (See 226 N. Y. 696.)

FRANK BICKLEMEYER, Appellant, v. LACKAWANNA STEEL COMPANY, Respondent.

(Submitted September 29, 1919; decided October 7, 1919.)

Motion for re-argument denied, with ten dollars costs and necessary printing disbursements. (See 227 N. Y. 565.)

FRANCIS D. BOWNE, Plaintiff, v. ELIZABETH B. COLT, Appellant, and JESSIE D. BOWNE, Respondent, Impleaded with Others.

(Submitted September 29, 1919; decided October 7, 1919.)

Motion for re-argument denied, with ten dollars costs and necessary printing disbursements. (See 226 N. Y. 658.)

THE PEOPLE OF THE STATE OF NEW YORK ex rel. MABEL L. SAFFORD, as Committee of the Person and Property of EDGAR R. BOLLES, an Incompetent Person, Appellant, v. EDWARD A. WASHBURN, Surrogate for the County of Genesee, et al., Respondents.

People ex rel. Safford v. Washburn, 188 App. Div. 951, appeal dismissed.

(Argued October 2, 1919; decided October 14, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 24, 1919, which affirmed an order of Special Term denying a motion for a writ of prohibition.

E. Jean Nelson Penfield for appellant.

Bayard J. Stedman, Frank S. Wood and *Henry H. Wittstein* for respondents.

Per Curiam. In December, 1918, the appellant applied to the Supreme Court for a writ of prohibition to restrain the hearing and determination by the surrogate of Genesee county of a proceeding for the judicial settlement of the accounts of testamentary trustees. The ground of the application was that jurisdiction was withdrawn from the surrogate by section 2641 of the

Code of Civil Procedure. The Supreme Court, at Special Term, denied the writ, and the Appellate Division affirmed the order.

Upon the argument in this court, the appellant's counsel conceded that the surrogate had determined the proceeding, that he had entered a decree, and that his term of office had expired.

In such circumstances, the writ of prohibition would be ineffectual if issued. The question has become an abstract one by force of lapse of time and changed events. The court will, therefore, decline to proceed to a determination of the merits (*Delavan v. N. Y., N. H. & H. R. R. Co.*, 216 N. Y. 359; *Mills v. Green*, 159 U. S. 651; *Jones v. Montague*, 194 U. S. 147).

The appeal should be dismissed, without costs to either party.

HISCOCK, Ch. J., CHASE, CARDODOZ, POUND, McLAUGHLIN and ANDREWS, JJ., concur; HOGAN, J., absent.

Appeal dismissed.

THE EASTERN STEEL COMPANY, Appellant, *v.* GLOBE INDEMNITY COMPANY et al., Respondents.

Eastern Steel Co. v. Globe Indemnity Co., 186 App. Div. 892, affirmed.
(Argued September 29, 1919; decided October 14, 1919.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 17, 1918, which *unanimously* affirmed a judgment in favor of defendants entered upon an order of Special Term sustaining a demurrer of one of the defendants to the complaint and granting a motion by the other defendants for judgment on the pleadings. Wills & Marvin Co. (not a party herein) on January 6, 1913, entered into a contract with the city of New York to do certain work and furnish certain materials in connection with the Brooklyn Institute of Arts and Sciences, at the same time filing with the proper authorities of the said city a bond conditioned for the faithful performance of the said contract

with the three defendants herein as sureties. Some time thereafter Wills & Marvin Co. entered into a contract with the plaintiff, a foreign corporation, which as subcontractor agreed to furnish certain materials required under said contract at the price of \$127,891.76. The complaint alleged that all of said sum was paid to plaintiff except \$21,915.56, for which amount it sued. The bond contained the following clause: "and shall promptly make payments of the sums due to all persons supplying labor and materials in the prosecution of the work provided in the said contract," upon which plaintiff relied. The complaint was dismissed upon the ground that the bond ran to the city of New York, and presumably was executed solely for its benefit and not for that of subcontractors.

John J. Cushing and James De Witt Andrews for appellant.

Daniel Combs, James I. Cuff and Ten Eyck R. Beardsley for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDODOZ, POUND, McLAUGHLIN and ANDREWS, JJ.

SAMUEL ROSENTHAL et al., Appellants, v. THOMAS LIGHT,
Respondent.

Rosenthal v. Light, 185 App. Div. 702, affirmed.

(Submitted September 29, 1919; decided October 14, 1919.)

APPEAL from a judgment entered January 17, 1919, upon an order of the Appellate Division of the Supreme Court in the first judicial department, which reversed an order of Special Term overruling a demurrer to the complaint, sustained such demurrer and directed a dismissal of the complaint, which alleged an agreement by defendant to cause and procure the incorporation under the laws of the state of Connecticut of a corporation to be called the Monroe Clothes Shop Company, of which the defendant was to be an incorporator, director

and stockholder, and also to procure the execution by said corporation after its organization of a certain contract or agreement with plaintiff, and the execution of a written guaranty by the defendant and his wife of the performance of the contract by the corporation. The complaint further alleged that the corporation was formed as agreed; that the defendant became an incorporator and a director and stockholder, and ever since its incorporation has been in active charge and management of said corporation, and its business, and that the defendant had failed, neglected, omitted and refused to cause and procure said corporation to execute and deliver the agreement or contract with plaintiffs, and had failed and refused to execute and deliver the guaranty by defendant and his wife. The defendant, in support of his demurrer to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, claimed that the contract was void as against public policy because it was an agreement which tended to hamper and control the functions of corporate officers, and that the proposed contract, if executed by the corporation, would be unenforceable for indefiniteness and lack of mutuality,

W. Bennett Marx for appellants.

Thomas J. Kavanagh and *Herman B. Goodstein* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: *HISCOCK*, Ch. J., *CHASE*, *HOGAN*, *CARDOZO*, *POUND*, *McLAUGHLIN* and *ANDREWS*, JJ.

CHARLES F. LAWLER, Plaintiff, *v.* SHEFFIELD CONSTRUCTION COMPANY et al., Defendants.

SOUND HOLDING COMPANY, Appellant; WILLIAM J. DILTHEY, Respondent.

Lawler v. Sheffield Construction Co., 187 App. Div. 939, appeal dismissed.

(Submitted September 30, 1919; decided October 14, 1919.)

APPEAL from so much of an order of the Appellate Division of the Supreme Court in the second judicial department, entered May 1, 1919, as modifies an order of the Kings County Court by providing as a condition for the discontinuance of the within action, that the moving party, the Sound Holding Company, pay to the appellant the sum of \$367.80, the expenses of the reference, being \$75 for referee's fees, \$42.80 for those of the stenographer, and \$250 for appellant's expenses for counsel; and that if such payment be not made within ten days the motion to discontinue be denied, with ten dollars costs.

Eugene E. Kelly for appellant.

Effingham L. Holywell for respondent.

Appeal dismissed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDENZO,
POUND, McLAUGHLIN and ANDREWS, JJ.

LOUIS A. TYLER, Appellant, v. JOHN H. WINDELS,
Respondent.

Tyler v. Windels, 186 App. Div. 698, affirmed.

(Argued September 30, 1919; decided October 14, 1919.)

APPEAL from a judgment entered March 12, 1919, upon an order of the Appellate Division of the Supreme Court in the first judicial department, which reversed an order of Special Term denying a motion by defendant for judgment on the pleadings, granted said motion and directed a dismissal of the complaint. The action was on contract. The answer as a separate defense plead the Statute of Frauds, in that the contract was not by its terms to be performed within one year from the making thereof, and that there was no note or memorandum in writing subscribed by the defendant. By way of reply plaintiff alleged full performance of the contract except in so far as defendant had refused to pay a balance alleged to be due. The Appellate Division held that part performance did not render the contract enforceable.

Robert W. Crawford for appellant.

Alexander Holtzoff and *Paul Windels* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOWZO, POUND, McLAUGHLIN and ANDREWS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE TOWN OF HARMONY, Appellant, v. PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, SECOND DISTRICT, et al., Respondents.

People ex rel. Town of Harmony v. Public Service Commission, 187 App. Div. 962, affirmed.

(Argued September 30, 1919; decided October 14, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered March 4, 1919, which confirmed, on certiorari, an order of the public service commission of the state of New York, second district, denying an application for an order directing the Erie Railroad Company to repair certain bridges over its right of way.

Harlan L. Munson for appellant.

Marion B. Pierce for respondents.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CARDOWZO, POUND, McLAUGHLIN and ANDREWS, JJ. Dissenting: CHASE and HOGAN, JJ.

BOARD OF FOREIGN MISSIONS OF THE REFORMED CHURCH IN AMERICA, Plaintiff, v. JACOB VOLK, Respondent, and ALBERT A. VOLK et al., Appellants, Impleaded with Others.

Board of Foreign Missions of Reformed Church in America v. Volk, 188 App. Div. 967, affirmed.

(Argued September 30, 1919; decided October 14, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 27, 1919, which affirmed an order of Special Term

confirming the report of a referee, and directing distribution in surplus money proceedings arising upon a foreclosure sale. The referee found that Jacob Volk and his father, Sussman Volk, originally owned the mortgaged premises as tenants in common; that on April 1, 1907, Jacob Volk conveyed his one-half interest therein to his father in trust for Jacob Volk, and that in consequence thereof upon his father's death he became seized in equity of the one-half interest, so held in trust for him, in addition to the one-seventh interest he would take as heir at law of his father. The appellants maintained that the deed dated April 1, 1907, given by Jacob Volk to his father, Sussman Volk, was an absolute transfer of a one-half interest in the property and not one clothed or impressed with a trust in Jacob's favor; that Sussman Volk at the time of his death was seized of the said premises in fee simple, and that his seven children and heirs at law share equally in the said surplus, each being entitled to a one-seventh interest therein, subject to the widow's dower.

Percival C. Smith for appellants.

Jacob I. Berman for respondent.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDENZO,
POUND, McLAUGHLIN and ANDREWS, JJ.

**JESSE W. RENO, Respondent, v. FREDERIC BULL et al.,
Appellants.**

(Submitted October 6, 1919; decided October 14, 1919.)

Motion for re-argument denied, with ten dollars costs and necessary printing disbursements. (See 226 N. Y. 546.)

**THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. BENNY SABATINO, Appellant.**

(Submitted October 6, 1919; decided October 14, 1919.)

Motion for re-argument denied. (See 224 N. Y. 589.)

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. JEREMIAH G. TRINCAL, Appellant.

People v. Trincal, 180 App. Div. 894, appeal dismissed.

(Submitted October 6, 1919; decided October 14, 1919.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered October 26, 1917, which affirmed a judgment of the Court of Special Sessions of the city of New York convicting the defendant of a violation of section 1148 of the Penal Law.

The motion was made upon the ground of failure to file the return.

Edward Swann, District Attorney (*Felix C. Benvenga* of counsel) for motion.

No one opposed.

Motion granted and appeal dismissed.

THE PEOPLE OF THE STATE OF NEW YORK ex rel.
IROQUOIS DOOR COMPANY, Appellant, *v. WALTER H. KNAPP* et al., Composing the Tax Commission of the State of New York, Respondents.

People ex rel. Iroquois Door Co. v. Knapp, 186 App. Div. 172, affirmed.

(Argued October 1, 1919; decided October 21, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered January 24, 1919, which confirmed a determination of the state tax commission refusing to credit the relator, on its franchise tax for the year ending November 1, 1918, with more than one-half of the local tax paid by it in the year 1917.

John A. Van Arsdale for appellant.

Charles D. Newton, Attorney-General (*Claude T. Dawes* of counsel), for respondents.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ.

WILLIAM J. SCHIEFFELIN, Respondent, v. **JOHN F. HYLAN** et al., Constituting the Board of Estimate and Apportionment of the City of New York, et al., Appellants.
Schieffelin v. Hylan, 188 App. Div. 192, affirmed.
(Argued October 1, 1919; decided October 21, 1919.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 6, 1919, which affirmed an order of Special Term granting a motion for the continuance of an injunction *pendente lite* in a taxpayer's action.

The following questions were certified:

"1. Has the board of estimate and apportionment of the city of New York power to authorize the issuance of corporate stock of the city of New York to the amount of \$4,500,000, under the resolution of February 7, 1919, and to apply the proceeds thereof as provided by said resolution?

"2. Does the Rapid Transit Act, as amended by chapter 226 of the Laws of 1912, require that such part of the expenses of the public service commission as are included in the cost of the construction of the dual system of subways shall be paid out of the proceeds of the sale of the corporate stock of the city of New York, or has the board of estimate and apportionment an election from which source to authorize payment of such expenses?

"3. Do the provisions of subway contract No. 3 express the determination by the public service commission for the first district, which is provided for in section 10 of the Rapid Transit Act, as added by chapter 226 of the Laws of 1912, as to the part of the commission's expenses to be included in the cost of construction of the railroad to be built under such contract?

"4. Do the provisions of subway contract No. 4 express the determination by the public service commission for the first district, which is provided for in section 10 of the Rapid Transit Act, as added by chapter 226 of the Laws of 1912, as to the part of the commission's expenses to be included in the cost of construction of the railroad to be built under such contract?

“ 5. Has the public service commission made such a requisition for or determination of, the part of its expenses to be included in the cost of construction of the railroad under the Rapid Transit Act provided for under subway contract No. 3 or under subway contract No. 4 so as to authorize the issue of corporate stock of the city for such purpose under section 10 of the Rapid Transit Act, as amended?

“ 6. Where all the expenses of the public service commission have been paid from revenue bonds of the city of New York, may the board of estimate and apportionment of said city, upon proper determination of the public service commission, that some part of such expenses shall be included in subway construction cost, authorize the city to issue its corporate stock upon the basis of such expenses, and apply the proceeds of such stock in part to redeem such special revenue bonds, and in part to the general fund for reduction of city taxation?

“ 7. Upon the facts and in the circumstances disclosed by this record is the plaintiff entitled to maintain a taxpayer's action to restrain the defendants from carrying out the terms of the resolution of February 7, 1919, which is the subject of the present controversy?”

William P. Burr, Corporation Counsel (John F. O'Brien and John Lehman of counsel), for appellants.

Leonard M. Wallstein for respondent.

Order affirmed, with costs. First question certified answered in negative. Third, fourth and seventh questions answered in affirmative. Fifth question answered in negative. The public service commission has made no sufficient requisition. Second and sixth questions not answered; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ. Absent: HOGAN, J.

**JOAQUIN A. DE O. BOTELHO, Respondent, v. JULIUS H.
SIEBERT, Appellant.**

Botelho v. Siebert, 188 App. Div. 966, appeal dismissed.

(Argued October 1, 1919; decided October 21, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 30, 1919, which affirmed an order of Special Term denying a motion to vacate an execution against the person of the defendant.

Joseph Schottland for appellant.

Charles E. McMahon and *George B. Hayes* for respondent.

Appeal dismissed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CARDODOZ, POUND,
MC LAUGHLIN and ANDREWS, JJ. Absent: HOGAN, J.

In the Matter of the Arbitration between THE WHEAT EXPORT COMPANY, INCORPORATED, Respondent, and THE NEW CENTURY COMPANY, Appellant.

Matter of Wheat Export Co., Inc., 185 App. Div. 723, affirmed.

(Argued October 2, 1919; decided October 21, 1919.)

APPEAL from two orders of the Appellate Division of the Supreme Court in the first judicial department, entered January 10, 1919, which reversed two orders of Special Term, one denying a motion to confirm an award in arbitration proceedings and the other granting a motion to vacate and set aside said award. The orders at Special Term were made on the ground the arbitrators had not carried out the terms of the submission in that they had not complied with certain rules of the New York Produce Exchange forming part of the contract in controversy. The Appellate Division, however, held that these rules were properly disregarded by the arbitrators, because they were inapplicable to the facts in the case.

David Haar and *Max Frieder* for appellant.

Victor E. Whitlock for respondent.

Orders affirmed and award confirmed, with one bill of costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CARDZOZ, POUND, McLAUGHLIN and ANDREWS, JJ. Absent: HOGAN, J.

In the Matter of the Claim of ADOLPH SCHIFF, Respondent, against HERMAN SCHEUER et al., Copartners under the Firm Name of HERMAN SCHEUER & SONS et al., Appellants.

STATE INDUSTRIAL COMMISSION, Respondent.

Schiff v. Scheuer, 188 App. Div. 944, affirmed.

(Argued October 2, 1919; decided October 21, 1919.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered May 19, 1919, unanimously affirming an award of the state industrial commission made under the Workmen's Compensation Law. The claimant, with four other men, had been working on July 4, 1918. When the men stopped work they found the watchman had locked the doors. After waiting a while three of them obtained a hose, which was placed out of a window, and they slid down this hose to reach the ground. The claimant then attempted to slide down the hose, slipped and fell to a platform beneath, causing a fracture of the leg. Appellants contended that the injury did not arise out of and in the course of the employment.

Jeremiah F. Connor for appellants.

Charles D. Newton, Attorney-General (*E. C. Aiken* of counsel), for respondent.

Order affirmed, with costs; no opinion.

Concur: CHASE, CARDZOZ, POUND and ANDREWS, JJ. Dissenting: McLAUGHLIN, J. Absent: HOGAN, J. Not voting: Hiscock, Ch. J.

In the Matter of the Claim of FLORENCE H. DODD,
Respondent, against FOUR SIXTY-ONE EIGHTH AVENUE
COMPANY, INCORPORATED, et al., Appellants.

STATE INDUSTRIAL COMMISSION, Respondent.

Dodd v. Four Sixty-one Eighth Avenue Co., Inc., 188 App. Div. 941,
affirmed.

(Argued October 2, 1919; decided October 21, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered May 13, 1919, affirming an award of the state industrial commission made under the Workmen's Compensation Law. The original award provided for weekly payments to the claimant. Thereafter, on her petition, the industrial commission commuted these periodical payments to a lump sum. Appellants contended that an award under section 25 or 27 of the Workmen's Compensation Law commuting periodical payments in a death case to a widow and children dependent upon the deceased to one lump sum is in violation of the Constitutions of the state of New York and of the United States, in that it prejudices the privileges and immunities of citizens of the state of New York and of the United States, and in that it takes property without due process of law.

William H. Foster and James B. Henry for appellants.

Charles D. Newton, Attorney-General (E. C. Aiken of counsel), for respondent.

Order affirmed, with costs; no opinion.

Concur: CHASE, CARDOZO, POUND and ANDREWS, JJ.

Dissenting: HISCOCK, Ch. J., and McLAUGHLIN, J.

Absent: HOGAN, J.

In the Matter of the Claim of MARTHA O'ESAU, Respondent, against E. W. BLISS COMPANY et al., Appellants.

STATE INDUSTRIAL COMMISSION, Respondent.

O'Esau v. Bliss Co., 186 App. Div. 556, affirmed.

(Argued October 2, 1919; decided October 21, 1919.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the third judicial

department, entered March 20, 1919, unanimously affirming an award of the state industrial commission made under the Workmen's Compensation Law. John M. O'Esau, the deceased herein, was employed by the E. W. Bliss Company as a shell inspector, and on the 28th day of March, 1916, was rolling shells along a bench and caught his finger between two shells, causing a contusion of the third finger of the right hand. He continued working from the date of his injury until the 30th day of April, 1917, upon which date he was compelled to stop work, owing to the condition of his finger. He did not file a claim for compensation until June 6, 1917, which was more than one year from the date of his injury. On the 21st day of March, 1918, he died as a result of his injury, and on the following day his widow filed a claim for compensation with the state industrial commission; and after a hearing an award was duly made to her for death benefits under the Compensation Law. Appellants contended that the widow was estopped from filing a claim for compensation by reason of the failure of her husband to file his claim within one year after the accident.

William H. Foster and James B. Henney for appellants.

Charles D. Newton, Attorney-General (*E. C. Aiken* of counsel), for respondent.

Order affirmed, with costs; no opinion.

Concur: CHASE, HOGAN, CARDENZO and POUND, JJ.
Dissenting: McLAUGHLIN and ANDREWS, JJ. Not voting:
HISCOCK, Ch. J. _____

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, Appellant, v. EDWIN W. JOSLIN, Mayor of the City of Watervliet, et al., Respondents.

People ex rel. Fidelity & Casualty Co. of N. Y. v. Joslin, 188 App. Div. 405, affirmed.

(Argued October 3, 1919; decided October 21, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered

August 26, 1919, which reversed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the defendants to pay to relator a sum alleged to be due on a contract for the improvement of the water system of the city of Watervliet, which sum, it was admitted, had been raised by taxation and was in the hands of the city chamberlain. The Appellate Division held as matter of law that mandamus would not lie for the reasons: *First*, that the water board had adopted a resolution charging the contractor with damages for delay in an amount greater than the sum due and declaring said sum forfeited, and, *second*, that the claim had not been audited in accordance with the provisions of a new city charter which went into effect after relator's final estimate had been made and delivered.

Charles B. Sullivan and Edwin A. Jones for appellant.
Chester Wood, Corporation Counsel, for respondents.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CARDZOZO, POUND,
McLAUGHLIN and ANDREWS, JJ. Absent: HOGAN, J.

In the Matter of the Application for the Appointment of a Committee of the Person and Property of LAVINIA CLARKSON, Respondent, an Alleged Incompetent Person.

EMILIE V. MOORE, Appellant.

Matter of Clarkson, 186 App. Div. 575, affirmed.

(Argued October 7, 1919; decided October 21, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered March 13, 1919, which reversed an order of Special Term granting a motion for the issuance of a commission to determine the mental competency of the respondent herein. The Appellate Division held *first*, that a former application resulting in a dismissal of the proceedings was *res adjudicata* and a bar to this proceeding; *second*, that it appearing that the alleged incompetent resides in New York city, where the first proceeding was instituted,

it was improper to institute this second proceeding in St. Lawrence county; *third*, that upon the merits a commission should not issue.

Edgar T. Brackett and *Robert M. Moore* for appellant.
Thomas Spratt and *F. L. Cubley* for respondent.

Order affirmed, with costs; no opinion.

Concur: *Hiscock*, Ch. J., *CHASE*, *COLLIN*, *HOGAN*, *POUND*, *McLAUGHLIN* and *CRANE*, JJ.

In the Matter of the Application of **FRANK B. COTTE**,
Appellant, for a Writ of Mandamus against **FRANKLIN
C. GILBERT** as Town Clerk of the Town of Hempstead,
Respondent, Impleaded with Others.

Matter of Cotte v. Gilbert, 189 App. Div. 913, affirmed.

(Argued October 17, 1919; decided October 21, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered October 11, 1919, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus directed to the town clerk of the town of Hempstead and to the board of elections of the county of Nassau directing them to disregard in preparing the official ballots the names of Hiram R. Smith and George Wilbur Doughty as candidates for the office of supervisor of the town of Hempstead to be voted for on November 4, 1919, and to omit the names and each of them from the ballots. On September 8, 1919, the Republican town committee of the town of Hempstead, acting under and pursuant to chapter 289 of the Laws of 1918, attempted to nominate Hiram R. Smith and George Wilbur Doughty as candidates for the office of supervisor, and certified to the town clerk of Hempstead and to the board of elections of Nassau county that said Smith and said Doughty had been nominated for such office. Petitioner, claiming that chapter 289 of the Laws of 1918 is unconstitutional, asked for a peremptory writ of mandamus to the end that the names of Smith and Doughty might be omitted from the official ballots.

Alfred A. Gardner and Raymond Malone for appellant.
M. Linn Bruce and Jeremiah Wood for respondent.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CARDODOZO,
POUND, CRANE and ANDREWS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. Jacob Saul, Appellant.

People v. Saul, 188 App. Div. 25, appeal dismissed.

(Submitted October 13, 1919; decided October 21, 1919.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 23, 1919, which affirmed a judgment of the Kings County Court rendered upon a verdict convicting the defendant of the crime of criminally receiving stolen property in the first degree.

The motion was made upon the ground of failure to file the return.

*Henry E. Lewis, District Attorney (Ralph E. Hemstreet
of counsel)*, for appellant.

No one opposed.

Motion granted and appeal dismissed.

In the Matter of the Application of HENRY D. QUINBY,
Individually and as Comptroller of the City of Rochester, et al., Appellants, for a Writ of Prohibition against THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK FOR THE SECOND DISTRICT et al., Respondents.

(Submitted September 29, 1919; decided October 21, 1919.)

MOTION for re-argument. (See 223 N. Y. 244.)

Kernan & Kernan, counsel for respondent New York State Railways, for motion.

Ledyard P. Hale, counsel for respondent Public Service Commission, Second District, for motion.

Terence Farley, counsel for Public Service Commission, First District, intervening, for motion.

B. B. Cunningham, counsel for appellants, opposed.

Wm. P. Burr, counsel for city of New York, intervening, in opposition.

Per Curiam. This case was decided eighteen months ago (223 N. Y. 244) by holding that the public service commission had not been given the power, on the application of the railroad, to regulate and increase rates of fare on street railroads when such rates were fixed as conditions to the consent of the local authorities to the operation of the road.

The distinction between a motion for a re-argument and the presentation of the same question *de novo* has often been pointed out. (*Fosdick v. Town of Hempstead*, 126 N. Y. 651; *Colonial City Traction Co. v. Kingston City R. R. Co.*, 154 N. Y. 493.) Nothing decisive of this case was overlooked. Motion for re-argument herein fails to produce any "clear and definite language" in the statutes which discloses the legislative intent to deal with the matter of rates so fixed by agreement with local authorities. The Constitution (Art. III, sec. 18) prohibits the legislature to pass any law to "authorize the construction or operation of a street railroad" except upon the consent of the local authorities first obtained and thus to some extent curtails legislative power over the operation of street railroads. We held that it did not fairly appear and it would not be assumed that the legislature had authorized the public service commission to nullify the conditions attached to such consents by increasing rates without the consent of the local authorities. The court declined to determine the limits of legislative power in this connection and nothing which was said on that point as to the construction of article III, section 18, was essential to the decision. The motion should be denied, with ten dollars costs.

It is urged that certain rates in the city of Rochester are fixed solely by statute (L. 1915, ch. 359, § 7) and that the writ herein prohibits the public service commission from entertaining a proceeding to regulate such rates. The opinion, read with the writ, indicates that the

purpose of the decision is to limit the effect of the writ to rates fixed by consent of the local authorities.

The motion to amend the remittitur should, therefore, be denied, without costs.

All concur.

Motion denied. _____

HAZLITT A. CUPPY, Appellant, v. ARTEMAS WARD et al., Respondents.

Cuppy v. Ward, 187 App. Div. 625, affirmed.

(Argued October 8, 1919; decided October 24, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 20, 1919, affirming a judgment in favor of defendants entered upon an order of Special Term sustaining demurrers to and directing a dismissal of the complaint which alleged that plaintiff and defendant Ward heretofore had entered into an agreement to purchase the stock of a foreign corporation, the plaintiff to have the management of the business until the amounts invested by the parties had been repaid, when the stock was to be divided between them in accordance with the agreement; that the parties continued to act under the agreement for a number of years during which no dividends were declared but a large surplus was accumulated; that defendant Ward with intent to procure control of the business had used his control of a majority of the stock to elect directors hostile to plaintiff who had excluded him from the management of the business and refused to pay him the salary provided by the contract. The relief asked by plaintiff is substantially that Ward and the other defendants be enjoined from excluding him from the care and conduct of the business and from the management of the factory, and that they be directed to restore him to the care and conduct of the business and to the position and salary assured to him by the agreement until the expiration of the time fixed by the agreement and that Ward be directed to transfer to plaintiff

enough stock to make the proportions fifty-one per cent temporarily to Ward and forty-nine per cent of the issued stock to Cuppy, and that if necessary a receiver be appointed to effect the necessary action, and that Ward meanwhile be restrained from disposing of the percentage of stock that he holds which should go to Cuppy to make up his holdings to forty-nine per cent of the issued stock.

Frank R. Savidge and *Frederick M. Thompson* for appellant.

Edward W. Hatch, *Frank B. Church* and *Herman S. Hertwig* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: *Hiscock*, Ch. J., *CHASE*, *COLLIN*, *HOGAN*, *McLAUGHLIN* and *CRANE*, JJ. Dissenting: *POUND*, J.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. *GEORGE DE SOMMA*, Appellant.

(Argued October 8, 1919; decided October 24, 1919.)

APPEAL from a judgment of the Supreme Court rendered March 3, 1919, at a Trial Term for the county of Westchester, upon a verdict convicting the defendant of the crime of murder in the first degree.

James Dempsey and *John Palmieri* for appellant.

Lee Parsons Davis, *District Attorney* (*Thomas A. McKennell* of counsel), for respondent.

Judgment of conviction affirmed; no opinion.

Concur: *Hiscock*, Ch. J., *CHASE*, *COLLIN*, *HOGAN*, *POUND*, *McLAUGHLIN* and *CRANE*, JJ.

HANNAH C. DENNIN, Appellant, *v.* THOMAS W. FINUCANE et al., Defendants, and JAMES G. CUTLER et al., Respondents.

Dennin v. Finucane, 176 App. Div. 946, affirmed.

(Argued October 9, 1919; decided October 24, 1919.)

APPEAL from a judgment entered January 16, 1917, upon an order of the Appellate Division of the Supreme Court

in the fourth judicial department, which affirmed a judgment in favor of defendants, respondents, entered upon an order of Special Term sustaining a demurrer to and directing a dismissal of the complaint. Plaintiff sued in equity, as assignee, for the rescission of certain contracts and the recovery of the purchase price of certain bonds.

Louis Marshall and Arthur W. Weil for appellant.
Joseph W. Taylor and William H. Page for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, POUND, McLAUGHLIN and CRANE, JJ.

HANNAH C. DENNIN, Appellant, *v.* THOMAS W. FINUCANE et al., Respondents, Impleaded with Others.

Dennin v. Finucane, 176 App. Div. 946, affirmed.

(Argued October 9, 1919; decided October 24, 1919.)

APPEAL from a judgment entered January 16, 1917, upon an order of the Appellate Division of the Supreme Court in the fourth judicial department, which affirmed a judgment in favor of defendants, respondents, granting a motion by said defendants for judgment in their favor on the pleadings. Plaintiff sued in equity, as assignee, for the rescission of certain contracts and the recovery of the purchase price of certain bonds.

Louis Marshall and Arthur W. Weil for appellant.
Fred A. Robbins for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, POUND, McLAUGHLIN and CRANE, JJ.

HANNAH C. DENNIN, Appellant, *v.* THOMAS W. FINUCANE et al., Defendants, and HIRAM R. WOOD et al., as Executors of EUGENE SATTERLEE, Respondents.

Dennin v. Finucane, 176 App. Div. 946, affirmed.

(Argued October 9, 1919; decided October 24, 1919.)

APPEAL from a judgment entered January 27, 1919, upon an order of the Appellate Division of the Supreme Court

in the fourth judicial department, which affirmed a judgment in favor of defendants, respondents, entered upon an order of Special Term granting a motion by said defendants for judgment in their favor upon the pleadings. Plaintiff sued, in equity, as assignee, for the rescission of certain contracts and the recovery of the purchase price of certain bonds.

Louis Marshall and Arthur W. Weil for appellant.

Hugh Satterlee for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, POUND, McLAUGHLIN and CRANE, JJ.

HANNAH C. DENNIN, Appellant, v. THOMAS W. FINUCANE et al., Defendants, and JOHN C. POWERS, Respondent.

Dennin v. Finucane, 176 App. Div. 946, affirmed.

(Argued October 9, 1919; decided October 24, 1919.)

APPEAL from a judgment entered February 2, 1917, upon an order of the Appellate Division of the Supreme Court in the fourth judicial department, which affirmed a judgment in favor of defendant, respondent, entered upon an order of Special Term granting a motion by said defendant for judgment in his favor upon the pleadings. Plaintiff sued in equity, as assignee, for the rescission of certain contracts and the recovery of the purchase price of certain bonds.

Louis Marshall and Arthur W. Weil for appellant.

Joseph W. Taylor for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, POUND, McLAUGHLIN and CRANE, JJ.

HANNAH C. DENNIN, Appellant, *v.* THOMAS W. FINUCANE et al., Defendants, and JOHN C. WOODBURY, Respondent.

Dennin v. Finucane, 176 App. Div. 946, affirmed.

(Argued October 9, 1919; decided October 24, 1919.)

APPEAL from a judgment entered January 26, 1917, upon an order of the Appellate Division of the Supreme Court in the fourth judicial department, which affirmed an order of Special Term sustaining a demurrer to and directing a dismissal of the complaint as to defendant, respondent. Plaintiff sued in equity, as assignee, for the rescission of certain contracts and the recovery of the purchase price of certain bonds.

Louis Marshall and Arthur W. Weil for appellant.

James S. Havens for respondent.

Judgment affirmed, without costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, POUND, McLAUGHLIN and CRANE, JJ.

In the Matter of the Application for Ancillary Letters Testamentary on the Will of REBECCA T. R. GAY, Deceased.

ANNA VON WERNSTEDT et al., Appellants; BENJAMIN E. HARWOOD, Respondent.

Matter of Gay (Will), 188 App. Div. 918, affirmed.

(Argued October 6, 1919; decided November 18, 1919.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 23, 1919, which affirmed a decree of the New York County Surrogate's Court granting ancillary letters testamentary upon the will of Rebecca T. R. Gay, deceased. The petitioner alleged that he is a citizen of the United States domiciled in Connecticut; that the deceased died in France, leaving a will, which was duly established in accordance with the laws of France, and in which he is named as universal legatee, and that under the law of France he is entitled to take

into his possession the personal property of the deceased wherever situated. He further alleged that the deceased left personal property in New York county. Subsequently to the filing of the petition for ancillary letters Anna Von Wernstedt, one of the next of kin of the deceased, made application for permission to intervene in the proceeding, and filed objections to the jurisdiction of the Surrogate's Court to grant ancillary letters on the estate of the deceased. She also asked that the court require the petitioner to commence *do novo* proceedings to probate the will of the deceased in this state. The surrogate held that from an examination of the French Code and the record of the proceeding before the Civil Tribunal of Nice, the will of the testatrix was "established" before that tribunal within the sensible and real meaning of the requirement of section 2629, Code of Civil Procedure, and that the universal legatee, to whom "*envoi en possession*" was granted by that court, is justly entitled to receive ancillary letters.

George L. Ingraham and *Julian M. Wright* for appellants.

Francis M. Scott, Bertram L. Marks, Julian A. Gregory and *Allen S. Wrenn* for respondent.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, POUND, McLAUGHLIN and CRANE, JJ. Absent: HOGAN, J.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. LEVI B. DEDRICK, Appellant.

People v. Dedrick, 184 App. Div. 915, appeal dismissed.

(Submitted October 13, 1919; decided November 18, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered May 14, 1918, unanimously affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury in an action under sections 1638 *et seq.* of the Code of Civil Procedure to determine the title to certain real property.

Carl L. McMahon for appellant.

Charles D. Newton, Attorney-General (*William T. Moore* of counsel), for respondent.

Appeal dismissed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CARDZOZO, POUND, CRANE and ANDREWS, JJ.

In the Matter of the Application of RAMAPO MOUNTAINS WATER, POWER AND SERVICE COMPANY, INCORPORATED, Appellant, against JULIA F. SIEDLER et al., Respondents.

Matter of Ramapo Mountains Water, P. & S. Co., Inc., v. Siedler, 186 App. Div. 963, affirmed.

(Argued October 13, 1919; decided November 18, 1919.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered January 3, 1919, which unanimously affirmed a judgment of Special Term dismissing the petition of the appellant herein in condemnation proceedings to acquire certain lands in the town of Ramapo, Rockland county, for water supply purposes on the ground that the defendant commissioners of the Palisades Interstate Park had previously acquired title to certain of the lands sought to be taken by the Ramapo Mountains Water, Power and Service Company, Inc., which were necessary to its project, and that the said company could not acquire lands so taken by the commissioners.

R. E. Digney and John M. Digney for appellant.

Montgomery Hare for Julia F. Siedler et al., respondents.

Joseph A. Warren and George A. Blauvelt for commissioners of Palisades Interstate Park, respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CARDZOZO, POUND, CRANE and ANDREWS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. VINCENZO ESPOSITO, Appellant.

(Argued October 14, 1919; decided November 18, 1919.)

APPEAL from a judgment of the Supreme Court, rendered December 13, 1918, at a Trial Term for the county of Schenectady, upon a verdict convicting the defendant of the crime of murder in the first degree.

James A. Leary and *Walter A. Fullerton* for appellant.

John R. Parker, *District Attorney*, for respondent.

Judgment of conviction affirmed; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CARDOWZO, POUND, CRANE and ANDREWS, JJ.

GERTRUDE JOHNSON, as Administratrix of the Estate of EDWARD L. JOHNSON, Deceased, Respondent, *v.* THE STATE OF NEW YORK, Appellant.

Johnson v. State of N. Y., 186 App. Div. 389, affirmed.

(Argued October 14, 1919; decided November 18, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 28, 1919, affirming a judgment of the Court of Claims awarding the plaintiff damages for the death of her husband, who while driving an automobile on a state highway on a foggy night failed to observe a curve in the road and went over the embankment and was killed. It was claimed that the state was negligent in failing to maintain a barrier at the point in question. A construction of the Highway Law as to the state's liability under the so-called "patrol system" was involved.

Charles D. Newton, *Attorney-General* (*J. L. Cheney* of counsel), for appellant.

James O. Sebring for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CARDOWZO, POUND, CRANE and ANDREWS, JJ.

FREDERICK W. WEHRUM, Respondent, *v.* CHARLES V. WEHRUM, Individually and as Executor of CHARLES C. WEHRUM, Deceased, et al., Appellants, Impleaded with Others.

Wehrum v. Wehrum, 179 App. Div. 814, appeal dismissed.

(Argued October 14, 1919; decided November 18, 1919.)

APPEAL from a judgment entered January 29, 1918, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term without a jury, and directing judgment in favor of plaintiff in an action to partition certain real property.

Jeremiah T. Mahoney and J. Archer Hodge for appellants.

Oscar Wagner and Bernard Kronthal for respondent.

Appeal dismissed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CARDOZO, POUND, CRANE and ANDREWS, JJ.

WILLIAM C. ATWATER et al., Respondents, *v.* ELKHORN VALLEY COAL-LAND COMPANY et al., Appellants, Impleaded with Another.

Atwater v. Elkhorn Valley Coal-Land Co., 184 App. Div. 253, affirmed.

(Submitted October 14, 1919; decided November 18, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered August 17, 1918, modifying and affirming as modified a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term in an action by minority stockholders of the Elkhorn Valley Coal-Land Company, a West Virginia corporation, to compel the presidents and secretaries of the company to account for moneys drawn as salaries from October, 1910, to October, 1916, claimed to have been both illegal and excessive.

Joseph M. Gazzam for appellants.

Alfred H. Townley and *Henry Siegrist* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CARDODOZO,
POUND, CRANE and ANDREWS, JJ.

MARGARET M. BOWDEN, as Trustee of Property of JULIA J. SUTFIN, Plaintiff, v. HEARL L. OWEN, Individually and as Executor of JULIA J. SUTFIN, Deceased, et al., Appellants, and LAWRENCE B. SUTFIN et al., Respondents, Impleaded with Others.

Bowden v. Owen, 187 App. Div. 910, affirmed.

(Argued October 15, 1919; decided November 18, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 9, 1919, affirming a judgment of Special Term settling the accounts of the plaintiff as trustee of property of Julia J. Sutfin and directing distribution of the trust fund. Julia J. Sutfin by her will left her residuary estate to a stranger in blood. Objections to probate having been made a settlement was arranged whereby the objections to probate were withdrawn and the legatee assigned one-third of the estate to a group of aunts of the testatrix and another one-third to a group of cousins. This settlement was attacked on this accounting on the ground that the aunts were next of kin and that the cousins had no right to share in the estate. The court held the agreement of settlement valid, and directed distribution to the residuary legatee and his assignees in accordance therewith.

Robert W. Fisher and *Henry W. Williams* for appellants.

George H. Stenacher for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CARDODOZO,
POUND, CRANE and ANDREWS, JJ.

CORNELIA DUGAS, as Administratrix of the Estate of EMIL DUGAS, Deceased, Respondent, *v.* BASHWITZ BROS. & COMPANY, INCORPORATED, Appellant.

Dugas v. Bashwitz Bros. & Co., 187 App. Div. 883, affirmed.
(Argued October 16, 1919; decided November 18, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 5, 1919, modifying and affirming as modified a judgment in favor of plaintiff entered upon a verdict. The action was brought to recover a commission which plaintiff claims defendant agreed to pay her assignor for alleged services in securing a contract from the Royal Italian Commission for the manufacture of military uniforms.

I. Maurice Wormser and Harry J. Sondheim for appellant.

Samuel F. Frank for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CARDODOZO, POUND, CRANE and ANDREWS, JJ.

IGNATZ H. ROSENFIELD, as Administrator of the Estate of LESLIE ROSENFIELD, Deceased, Respondent, *v.* ALBERT SMITH & SONS, INCORPORATED, Appellant, Impleaded with Others.

Rosenfeld v. Smith & Sons, Inc., 180 App. Div. 691, affirmed.
(Argued October 16, 1919; decided November 18, 1919.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 26, 1917, unanimously affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for the death of plaintiff's intestate alleged to have been occasioned through the negligence of defendant, appellant, who was employed to repair a steam boiler in the basement of a hotel building in New York city. The jury found that the repairs were negligently made so that when the boiler

was subjected to steam pressure it gave way causing the injury to plaintiff's intestate from which he died.

James B. Henney for appellant.

Saul Bernstein and *Marcus Schnitzer* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CARDODOZO,
POUND, CRANE and ANDREWS, JJ.

SUSIE V. HOLLENDER, as Administratrix with the Will
Annexed of JOHN A. GOODENOUGH, Deceased, Appellant,
v. FREDERICK H. WALLACE, as Administrator of
CHRISTOPHER D. WALLACE, Deceased, Respondent.

Hollender v. Wallace, 180 App. Div. 393, affirmed.

(Argued October 16, 1919; decided November 18, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 31, 1917, modifying and affirming as modified a judgment in favor of defendant entered upon a decision of the court on trial at Special Term. The action was brought under section 1861 of the Code of Civil Procedure and subsequent sections to establish an alleged lost will of Maria G. Wallace, deceased, which it was alleged by plaintiff had been destroyed by the husband of the alleged testatrix after the latter's death. The trial court, at the conclusion of plaintiff's case, dismissed the complaint on the ground that there was no sufficient proof of the making of the alleged lost will, that there was no sufficient proof of the contents of said alleged lost will, that there was no sufficient proof of the loss of said alleged lost will and no sufficient proof of its destruction other than by the alleged testatrix.

John H. Hazelton for appellant.

John M. Scoble for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CARDODOZO,
POUND, CRANE and ANDREWS, JJ.

WALTER B. MILKMAN, as Trustee in Bankruptcy of JOSE CASESA, Appellant, *v.* JOSE CASESA et al., Respondents.

Milkman v. Casesa, 182 App. Div. 894, affirmed.

(Submitted October 16, 1919; decided November 18, 1919.)

APPEAL from a judgment entered January 18, 1918, upon an order of the Appellate Division of the Supreme Court in the second judicial department, reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and directing a dismissal of the complaint. The judgment at Special Term, decreed, among other things, that certain real property, known as No. 339 East Fourth street, in the borough of Brooklyn, city of New York, which was conveyed to the defendant Rose A. Casesa by deed dated August 20, 1912, was really the property of her husband, the defendant Jose Casesa, and that it became the plaintiff's property by virtue of his appointment as trustee in bankruptcy of Jose Casesa. The Appellate Division held "that the evidence does not establish a cause of action in the trustee in bankruptcy. In view of the facts found the only remedy available is to the creditor at the time, in whose favor a trust results to the extent necessary to satisfy his just demand."

Benjamin Jaffe and Walter B. Milkman for appellant.

Joseph Niccia and George P. Foulk for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CARDOZO, POUND, CRANE and ANDREWS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. CHARLES F. McLAUGHLIN, Appellant.

(Argued October 17, 1919; decided November 18, 1919.)

APPEAL from a judgment of the Supreme Court rendered January 25, 1919, at a Trial Term for the county of Bronx, upon a verdict convicting the defendant of the crime of murder in the first degree.

Louis Susman and Samuel Goldstein for appellant.

Francis Martin, District Attorney (Charles B. McLaughlin and Albert Cohn of counsel), for respondent.

Judgment of conviction affirmed; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CARDODOZ, CRANE and ANDREWS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. JAMES P. CASSIDY, Appellant.

(Argued October 17, 1919; decided November 18, 1919.)

APPEAL from a judgment of the Supreme Court rendered January 25, 1919, at a Trial Term for the county of Bronx, upon a verdict convicting defendant of the crime of murder in the first degree.

Louis Susman and Samuel Goldstein for appellant.

Francis Martin, District Attorney (Charles B. McLaughlin and Albert Cohn of counsel), for respondent.

Judgment of conviction affirmed; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CARDODOZ, POUND, CRANE and ANDREWS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. WALTER BOJANOWSKI, Appellant.

(Argued October 20, 1919; decided November 18, 1919.)

APPEAL from a judgment of the Supreme Court rendered February 15, 1919, at a Trial Term for the county of Erie, upon a verdict convicting the defendant of the crime of murder in the first degree.

Percy S. Lansdowne and Joseph S. Kaszubowski for appellant.

Guy B. Moore for respondent.

Judgment of conviction affirmed under provisions of section 542 of the Code of Criminal Procedure; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDODOZ, CRANE and ANDREWS, JJ.

**THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. MUGERITCH MIHITERIAN, Appellant.**

(Argued October 20, 1919; decided November 18, 1919.)

APPEAL from a judgment of the Court of General Sessions of the Peace in the County of New York rendered January 15, 1919, upon a verdict convicting the defendant of the crime of murder in the first degree.

Charles E. Le Barbier for appellant.

Edward Swann, District Attorney (*Robert C. Taylor* of counsel), for respondent.

Judgment of conviction affirmed; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO, CRANE and ANDREWS, JJ.

**In the Matter of the Accounting of WILLIAM H. FISCHER,
as Executor of JOHN K. FISCHER, Deceased, Appellant.**

CATHERINE J. GASTMEYER et al., Respondents.

Matter of Fischer, 183 App. Div. 535, appeal dismissed.

(Argued October 20, 1919; decided November 18, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered July 3, 1918, which modified and affirmed as modified a decree of the Kings County Surrogate's Court settling the accounts of the executor of John K. Fischer, deceased.

Joseph A. Burdeau for appellant.

James N. MacLean and *Michel Kirtland* for respondents.

Appeal dismissed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO, CRANE and ANDREWS, JJ.

**THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. LOUIS K. LIGGETT COMPANY, Appellant.**

People v. Liggett Co., 184 App. Div. 937, affirmed.

(Argued October 20, 1919; decided November 18, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department,

entered June 21, 1918, which affirmed a judgment of the Court of Special Sessions of the city of New York convicting defendant of a violation of subdivision 2 of section 161 of the Labor Law prohibiting the employment of females in mercantile establishments after the hour of ten P. M. Defendant, a corporation engaged in the drug business, contended that the working hours of its employees are fixed by section 236 of the Public Health Law. The prosecution was based upon the theory that the defendant's store sold other things besides "drugs, medicines, chemicals, prescriptions or poisons" and, therefore, constituted a mercantile establishment within the meaning of the Labor Law.

Junius Parker, Morgan J. O'Brien, Roy M. Sterne and Vincent H. Rothwell for appellant.

Edward Swann, District Attorney (Robert C. Taylor of counsel), for respondent.

Judgment affirmed; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDODOZO, CRANE and ANDREWS, JJ.

AGATHA M. HERKE, as Administratrix of the Estate of FREDERICK C. HERKE, Deceased, Respondent, *v.* SOUTH BUFFALO RAILWAY COMPANY, Appellant.

Herke v. South Buffalo Railway Co., 185 App. Div. 945, affirmed.
(Argued October 21, 1919; decided November 18, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 29, 1918, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for the death of plaintiff's intestate alleged to have been occasioned through the negligence of defendant. The complaint alleged that on the 27th day of November, 1917, plaintiff's intestate was in the employ of the Lackawanna Steel Company, as a switch and track cleaner, within the plant of the said steel company, and that while in the discharge of his duties as such switch and track

cleaner a train of the defendant was negligently, carelessly and without warning backed against him, causing injuries which resulted in his death. The answer admitted plaintiff's intestate's employment as alleged, but denied that defendant was negligent in any of the manners or respects set forth in the complaint, and set up as affirmative defense that plaintiff's intestate came to his death through his own negligence and want of care, and not through any negligence or want of care on the part of the defendant.

Raymond C. Vaughan for appellant.

Karl A. McCormick for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO, CRANE and ANDREWS, JJ.

EDWIN A. HALL, as Administrator of the Estate of EDWIN HALL, Deceased, Appellant, *v.* INTERNATIONAL RAILWAY COMPANY, Respondent.

Hall v. International Railway Co., 184 App. Div. 925, affirmed.
(Argued October 22, 1919; decided November 18, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 11, 1918, affirming a judgment in favor of defendant entered upon a verdict in an action to recover for the death of plaintiff's intestate alleged to have been occasioned through the negligence of defendant. The intestate, a boy about six years of age, in company with some other boys got into defendant's yards at Cold Spring and started to play around the street cars then standing there. There were two cars on a track separated by a space of several feet. As the intestate was passing between the two cars another boy started one of them and plaintiff's intestate was caught between the cars and crushed, receiving injuries from which he died.

Hamilton Ward for appellant.

Harold S. Brown for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO, CRANE and ANDREWS, JJ.

NICHOLAS G. KEMPF et al., as Executors of GEORGE KEMPF, Deceased, Respondents, *v.* WILLIAM H. BIERS et al., Defendants, and FREDERICK BIERS, Appellant.

Kempf v. Biers, 176 App. Div. 269, affirmed.

(Argued October 22, 1919; decided November 18, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 16, 1916, affirming a judgment in favor of plaintiffs entered upon the report of a referee in an action for the foreclosure of a mortgage on real property. The question on appeal was as to the validity of certain orders amending the foreclosure judgment so as to provide for the distribution of surplus moneys.

Henry W. Willis for appellant.

Stephen V. O'Gorman for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO, CRANE and ANDREWS, JJ.

BESSIE GEYER, as Administratrix of the Estate of ABRAHAM GEYER, Deceased, Respondent, *v.* NEW YORK CONSOLIDATED RAILROAD COMPANY, Appellant.

Geyer v. N. Y. Consolidated R. R. Co., 184 App. Div. 890, affirmed.
(Argued October 22, 1919; decided November 18, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 25, 1918, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for the death of plaintiff's intestate alleged to have been occasioned through the negligence of the defendant, his employer. Plaintiff alleged that her intestate, on the night of his death, after reporting at the train dispatcher's office, started to cross the tracks to the station, when

he was struck by a car running without lights, which came around a near-by curve without warning. The defense was contributory negligence and assumption of risk.

John L. Wells, Thomas L. Hughes and George D. Yeomans for appellant.

John C. Robinson for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDODOZO, CRANE and ANDREWS, JJ.

JOHN JOSEPH PETRY et al., as Executors and Trustees under the Will of CHARLES F. PETRY, Deceased, Respondents, v. HENRIETTA LANGAN et al., Defendants, and CATHRYN PETRY et al., Appellants.

Petry v. Petry, 186 App. Div. 738, affirmed.

(Argued October 23, 1919; decided November 18, 1919.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 2, 1919, which affirmed a judgment entered upon a decision of the court on trial at Special Term construing a clause of the will of Charles F. Petry, deceased, reading as follows: "A one undivided one-half part of said portion of my estate so held in trust, I give, devise and bequeath unto the issue of my deceased brother, John Petry, absolutely and forever," the question in controversy being the scope of the word "issue;" whether it included only the children of John Petry, or all his descendants, and whether it included descendants born after the death of testator and before the death of the life tenant. The courts below held that by the use of the word "issue," the testator intended to give that portion of his estate to the children and grandchildren of his brother *per capita*.

Eli J. Blair and George W. Field for appellants.

John A. Hardiman for respondents.

Judgment affirmed, without costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDODOZO, CRANE and ANDREWS, JJ.

DORIS JENSEN, as Administratrix of the Estate of FREDERICK J. JENSEN, Deceased, Respondent, *v.* SOUTH BROOKLYN RAILWAY COMPANY, Appellant.

Jensen v. South Brooklyn Railway Co., 186 App. Div. 963, affirmed.
(Argued October 23, 1919; decided November 18, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 24, 1918, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for the death of plaintiff's intestate alleged to have been occasioned through the negligence of the defendant.

D. A. Marsh and George D. Yeomans for appellant.

Frederick S. Martyn and Adolph L. Pincoffs for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO, CRANE and ANDREWS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. JOSEPH USEFOF, Appellant.

(Argued October 24, 1919; decided November 18, 1919.)

APPEAL from a judgment of the Supreme Court, rendered February 8, 1919, at a Trial Term for the county of Bronx, upon a verdict convicting the defendant of the crime of murder in the first degree.

Martin W. Littleton, John D. Lindsay, Louis Susman and Samuel Goldstein for appellant.

Francis Martin, District Attorney (Charles B. McLaughlin and Albert Cohn of counsel), for respondent.

Judgment of conviction affirmed; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, CARDOZO and ANDREWS, JJ.; CRANE, J., concurs under provisions of section 542 of the Code of Criminal Procedure.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. JOSEPH COHEN, Appellant.

(Submitted October 20, 1919; decided November 18, 1919.)

Motion for re-argument denied. (See 223 N. Y. 406.)

WILLIAM HOLMAN, Appellant, *v.* WALTER R. PATTEN,
Respondent.

(Submitted November 17, 1919; decided November 25, 1919.)

Motion for re-argument denied, with ten dollars costs
and necessary printing disbursements. (See 227 N. Y.
22.)

PETER F. CAMPBELL, Respondent and Appellant, *v.* NEL-
SON H. TUNNICLIFF, Appellant and Respondent.

THOMAS A. CAMPBELL, Respondent and Appellant, *v.*
NELSON H. TUNNICLIFF, Appellant and Respondent.

Reported below, 185 App. Div. 506.

(Submitted November 17, 1919; decided November 25, 1919.)

MOTION in each of the above-entitled actions to dis-
miss the appeal of plaintiff from a judgment of the
Appellate Division of the Supreme Court in the first
judicial department, entered January 20, 1919, modifying
and affirming as modified a judgment in favor of plaintiff
entered upon a decision of the court on trial at Special
Term.

The motions were made upon the ground of failure to
file the required undertakings.

Francis S. Quinn for motions.

Leon N. Futter opposed.

Motions denied, without costs and undertaking filed
and served November 11, 1919, deemed permitted under
section 1303 of the Code of Civil Procedure.

HENRY L. DYER, as Surviving Trustee under the Will of GEORGE JONES, Deceased, Respondent, *v.* MARY O. SILKMAN, Individually and as Executrix and Trustee under the Will of THEODORE H. SILKMAN, Deceased, et al., Defendants, and KATHERINE M. NOLAN, Appellant.

Dyer v. Nolan, 185 App. Div. 893, appeal dismissed.

(Submitted November 17, 1919; decided November 25, 1919.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered July 31, 1918, reversing a judgment in favor of defendant, appellant, entered upon a decision of the court on trial at Special Term and directing judgment in favor of plaintiff.

The motion was made upon the ground that the questions involved had become moot and academic.

Winthrop A. Wilson for motion.

Gerald Nolan opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

CITY OF CORNING, Respondent, *v.* ANSON B. HOLMES, Appellant.

City of Corning v. Holmes, 180 App. Div. 458, affirmed.

(Argued November 17, 1919; decided December 2, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 21, 1917, which reversed an order of Special Term sustaining exceptions to the report of commissioners of appraisal in a grade crossing proceeding and confirmed said report. Defendant resisted confirmation of the report on the ground that the commissioners failed to make allowance for damage to his adjoining premises from interruption or loss of business and for incidental damages sustained while the work was in progress. The Appellate Division held that the award was adequate and covered all legal damages.

James O. Sebring for appellant.

Justin V. Purcell, Charles D. Newton and Floyd G. Greene for respondent.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CARDZOZO, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ.

CITY OF CORNING, Respondent, v. JOHN E. O'NEILL,
Appellant.

City of Corning v. O'Neill, 180 App. Div. 454, affirmed.

(Argued November 17, 1919; decided December 2, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 21, 1917, which reversed an order of Special Term sustaining exceptions to the report of commissioners of appraisal in a grade crossing proceeding and confirmed said report. Defendant contested the report on the ground that it failed to provide adequate compensation for damage to his adjoining property arising from loss of access and incidental injury arising from the doing of the work. The Appellate Division held that the award fully compensated defendant for all legal damages to which he was entitled.

James O. Sebring for appellant.

Justin V. Purcell, Charles D. Newton and Floyd G. Greene for respondent.

Ledyard P. Hale for public service commission, second district.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CARDZOZO, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ.

SAMUEL ROTTENBERG, as Trustee in Bankruptcy of
EMPIRE STATE SUSPENDER COMPANY, Appellant, *v.*
OSCAR ENGLANDER, Respondent.

Rottenberg v. Englander, 185 App. Div. 1, appeal dismissed.
(Submitted November 17, 1919; decided December 2, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered November 22, 1918, which reversed an order of Special Term denying a motion to strike the above-entitled action from the Special Term calendar and granted said motion.

David W. Kahn for appellant.

Louis Kunen and Oscar Englander for respondent.

Appeal dismissed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CARDZOZO, POUND,
McLAUGHLIN, CRANE and ANDREWS, JJ.

CORNELIUS D. CURNEN, Respondent, *v.* JOHN J. RYAN,
Defendant, and the INTERNATIONAL SHIPBUILDING
AND MARINE ENGINEERING CORPORATION, Appellant.

Curnen v. Ryan, 187 App. Div. 6, affirmed.
(Argued November 17, 1919; decided December 2, 1919.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 31, 1919, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. The action was in equity to impress a trust upon a certain contract entered into between the defendant International Shipbuilding and Marine Engineering Corporation and the United States Government and for an accounting.

The following questions were certified:

"1. Did the plaintiff, by the contract with Ryan, executed December 11, 1916, acquire any interest in the contract entered into by the International Shipbuilding and Marine Engineering Corporation and the Navy Department of the United States Government on the 3d day of May, 1917?

" 2. Upon the facts set forth in the findings herein, did the plaintiff clothe Ryan, who sold the award to the International Shipbuilding and Marine Engineering Corporation for the ten submarine chasers, with apparent authority to dispose of such award?

" 3. Upon the facts set forth in the findings herein, were plaintiff and Ryan joint adventurers, so that the International Shipbuilding and Marine Engineering Corporation, found by the Special Term to be a purchaser in good faith without notice and for value of the award, acquired this award free from all claims of the plaintiff?

" 4. Upon the facts set forth in the findings herein, was the plaintiff in any way estopped from claiming any interest in the submarine chaser contract?"

E. Crosby Kindleberger and Hamilton Rogers for appellant.

E. W. Hofstatter and Frank Comesky for respondent.

Judgment affirmed, with costs. First question certified not answered; second, third and fourth questions answered in the negative; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CARDENZO, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE
UNITED STATES, Appellant, v. JUDSON B. WILDS, as
Executor of CATHERINE H. B. SMITH, Deceased,
Respondent.

Equitable Life Assur. Society of U. S. v. Wilds, 188 App. Div. 912,
affirmed.

(Argued November 17, 1919; decided December 2, 1919.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 7, 1919, affirming a judgment in favor of defendant entered upon an order of Special Term granting a motion by defendant for judgment on the pleadings and directing a dismissal of the complaint. The complaint alleged that the husband of defendant's testatrix made two bonds and mortgages on properties on

Wall street and Broadway and Wall and Pearl streets in New York city. He died seized of said properties and also of an equity, worth \$38,000, on property on Seventy-seventh street. He left a will devising the Seventy-seventh street property to his wife (in lieu of dower). Judson B. Wilds and the United States Trust Company of New York became his executors and trustees. Some years after the husband's death the plaintiff foreclosed said two Wall street mortgages and took deficiency judgments for \$30,328.83 and \$86,484.15 against said executors — which they have not collected except for \$4,721.30. Testatrix, after the commencement of one of the foreclosure actions and before the commencement of the other, sold the Seventy-seventh street equity (worth \$38,000) to one Brower. She died on March 16, 1916, before one and after the other deficiency judgment was entered against her husband's executors. This action is brought in aid of the deficiency judgments to recover from the defendant \$38,000 as and for the value of the Seventy-seventh street devise which testatrix had sold. The complaint was held insufficient on the grounds: (1) That it failed to allege that there was not sufficient personal property left by Mr. Smith to pay his debts; and (2) that it failed to allege that the claim had been presented to Mrs. Smith's executors before suit.

William H. P. Oliver and Herbert S. Ogden for appellant.
Yorke Allen for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CARDOZO, POUND,
McLAUGHLIN, CRANE and ANDREWS, JJ.

BIRD S. COLER, Commissioner of Public Charities of the City of New York, on the Complaint of Rose WEINER, Respondent, *v.* MAX SEIDELMAN, Appellant.

Coler v. Seidelman, 188 App. Div. 885, affirmed.

(Argued November 18, 1919; decided December 2, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department,

entered April 23, 1919, affirming a judgment of the Court of Special Sessions of the city of New York in filiation proceedings. Defendant contended on appeal that complainant was a resident of Richmond county and, therefore, the Court of Special Sessions of the city of New York, sitting in New York county, had no jurisdiction of the proceeding.

Max Schleimer and Nathan H. Stone for appellant.

William P. Burr, Corporation Counsel (John F. O'Brien of counsel), for respondent.

Judgment affirmed; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CARDZOZO, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ.

MARIE C. LOWE, Respondent, *v.* MARY C. LEARY et al., Respondents, and MARIE J. LEARY et al., Appellants.

Lowe v. Leary, 184 App. Div. 421, affirmed.

(Argued November 18, 1919; decided December 2, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered November 26, 1918, which reversed an order of Special Term confirming the report of a referee. The action was in partition. The judgment provided that the referee should retain out of the proceeds of the sale the sum of \$8,000 to cover principal and interest of a certain lost mortgage which was unsatisfied of record. Thereafter the referee was directed to hear and determine all questions relating to said mortgage and to determine the manner of distribution of said fund. The referee reported that the circumstances surrounding the keeping and disappearance of the bond and mortgage gave rise to the inference that the principal and interest had been paid. The Appellate Division held that the mere disappearance of a bond and mortgage did not give rise to a presumption of payment; that as there was no presumption of payment and twenty years from the date of the last payment of interest had not elapsed there was no presumption that the debt was satisfied; that the bond and

mortgage may have been lost, inadvertently destroyed or given to some third person; that under these circumstances, the referee should be directed to pay the money into court to be held until the 8th day of March, 1922, unless in the meantime proper evidence be given to enable the holder of the bond and mortgage to receive the same, and that upon the expiration of said period the said sum, with any interest that may have accumulated thereon, shall be paid over to the persons to whom the proceeds of the sale were distributed under the final judgment and in proportion thereto.

Thomas F. Gilroy, Jr., for appellants.

George S. Mittendorf for respondents.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CARDODO, POUND,
McLAUGHLIN, CRANE and ANDREWS, JJ.

In the Matter of the Petition of OTTO BRAND, Respondent,
for Probate of the Will of SOPHIA MORISON, Deceased.

HARRY G. MORISON et al., Appellants; METHODIST
EPISCOPAL HOSPITAL, Respondent.

Matter of Brand, 185 App. Div. 134, affirmed.

(Argued November 18, 1919; decided December 2, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered December 12, 1918, which reversed a decree of the Sullivan County Surrogate's Court denying probate to an instrument propounded as the will of Sophia Morison, deceased, and directed that the will be admitted to probate. The case was sent to the Supreme Court for trial before a jury. The issues framed and submitted follow: 1. Is or is not the instrument propounded herein the last will and testament of Sophia Morison, deceased? 2. Was or was not such instrument duly executed as required by law? 3. Was or was not said Sophia Morison at the time of making such instrument of sound mind and memory and capable of making a will? 4. Was or was not the execution of said instrument by said Sophia Morison

obtained by undue influence? The jury answered the first question, "No;" the second and third, "No," and the fourth, "Yes." The Appellate Division held that the verdict was inconsistent, against the evidence and the weight of the evidence and contrary to law.

Joseph Rosch, John D. Lyons and Nellie Childs Smith for appellants.

Henry A. Ingraham and George L. Cooke for respondent.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CARDOWZO, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. Barney Scher et al., Appellants.

People v. Scher, 185 App. Div. 100, affirmed.

(Submitted November 18, 1919; decided December 2, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered November 15, 1918, which affirmed a judgment of the Court of Special Sessions of the city of New York convicting the defendants of the crime of conducting business under an assumed name in violation of section 440 of the Penal Law.

Joseph Gans and C. Arthur Jensen for appellants.

Harry E. Lewis, District Attorney (Ralph E. Hemstreet and John E. Ruston of counsel), for respondent.

Judgment affirmed; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CARDOWZO, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ.

ATLANTIC COMMUNICATION COMPANY, Respondent, *v. Leopold L. Zimmerman et al.*, Appellants.

Atlantic Communication Co. v. Zimmerman, 182 App. Div. 862, appeal withdrawn.

(Submitted November 24, 1919; decided December 2, 1919.)

MOTION for leave to withdraw an appeal from an order of the Appellate Division of the Supreme Court in the

first judicial department, entered May 3, 1918, reversing a judgment in favor of defendants entered upon a verdict and granting a new trial.

The motion was made upon the ground that it appeared from the resettled order of the Appellate Division that the reversal was on the facts.

Isidor Unger for motion.

James A. Delehanty opposed.

Motion granted on payment of costs and ten dollars costs of motion.

GEORGE HERMANN, Respondent, *v.* KATE LUDWIG et al.,
Appellants, Impleaded with Another.

Appeal — when judgment entered upon order of reversal insufficient — case remitted to Supreme Court for perfection of judgment — not reviewable by Court of Appeals on appeal from order alone.

When the Appellate Division in reversing a judgment makes new findings of fact and conclusions of law and by its order provides for equitable relief and costs and directs that judgment be entered accordingly, the entry of a judgment which merely recites the reversal of the judgment and adjudges recovery of costs is insufficient, and the Court of Appeals, upon appeal therefrom, will remit the case to the Supreme Court for perfection of the judgment. The decision of the Appellate Division is not reviewable by an appeal from the order made thereat alone, but must be from the judgment entered upon the order of reversal.

(Argued December 2, 1919; decided December 9, 1919.)

APPEAL from a judgment entered April 12, 1912, upon an order of the Appellate Division of the Supreme Court in the second judicial department, reversing a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term and directing judgment in favor of plaintiff.

Henry A. Friedman and *Charles L. Hoffman* for Kate Ludwig, appellant.

Howard C. Taylor for Christopher Hermann et al., appellants.

Sydney Rosenthal and *George C. Lay* for respondent.

Per Curiam. Plaintiff brought this action in equity to establish a will jointly executed by himself and wife on September 30, 1895, also for other relief. The complaint was dismissed at the Trial Term. From the judgment dismissing complaint on the merits, plaintiff appealed to the Appellate Division. The latter court reversed the judgment entered upon the decision of the Trial Term, reversed numerous findings made thereat and made new findings of fact and conclusions of law favorable to the plaintiff. The order of the Appellate Division provided for equitable relief and that plaintiff recover costs and disbursements of the court below and of "this court" to be taxed, and further that "judgment be entered accordingly." Plaintiff thereupon entered a judgment which recited the reversal of the judgment below and adjudged that plaintiff recover of the defendants \$829.99 costs and have execution therefor, but failed to enter the judgment directed by the order of the Appellate Division. Upon the appeal herein counsel for both parties argued at length various questions determined by the findings made by the Appellate Division. The record discloses a failure on the part of plaintiff's counsel to comply with the order of the Appellate Division which directed a judgment to be entered in accordance with the order made thereat, and as required by the Code of Civil Procedure (Sections 1345, 1355), thus leaving as the only judgment sought to be reviewed a judgment for costs. Even if we should affirm the judgment appealed from, such action would not enable the plaintiff to enforce the relief which he was awarded by the Appellate Division. The order alone is not a complete judgment but forms a part of the judgment roll. Judgment in pursuance of the order should have been perfected. It is not the province of this court to pass upon the questions involved in a case like the one at bar upon such a judgment as the one entered in this action. The decision of the Appellate Division herein is not reviewable by an appeal from the order

made thereat alone, but must be from the judgment entered upon the order of reversal.

The case is, therefore, remitted to the Supreme Court for such action as may be deemed proper.

HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, McLAUGHLIN, CRANE and ANDREWS, JJ., concur.

Ordered accordingly.

MARY B. MURPHY, as Administratrix of the Estate of JOHN J. MURPHY, Deceased, Respondent, v. LUDLUM STEEL COMPANY, Appellant.

Murphy v. Ludlum Steel Co., 182 App. Div. 139, affirmed.

(Argued October 24, 1919; decided December 9, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered March 18, 1918, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for the death of plaintiff's intestate alleged to have been occasioned through the negligence of defendant. Decedent and his wife (the plaintiff) were employed by the defendant and occupied a house on premises owned by defendant for which they paid rent. On the morning of the accident they started together for the defendant's plant, the intestate carrying a basket of laundry at the request of his wife for use in the restaurant conducted by her at the plant. As they passed through their yard an electric wire used by defendant to carry a current of high voltage broke and fell on intestate, causing his death. The question was whether the accident was within the purview of the Workmen's Compensation Law and the plaintiff's remedy limited to the relief prescribed thereunder.

Andrew J. Nellis for appellant.

Daniel J. Dugan and *Isadore Bookstein* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CHASE, HOGAN, CARDOZO and CRANE, JJ.

Dissenting: HISCOCK, Ch. J., COLLIN and ANDREWS, JJ.

ROBERT HOLMES, Individually and as Trustee et al., Respondents, v. HUGH N. CAMP, JR., Individually and as Executor of and Trustee under the Will of HUGH N. CAMP, Deceased, et al., Defendants, and EDWARD C. SMITH, Appellant.

Holmes v. Camp, 186 App. Div. 675, affirmed.

(Argued November 19, 1919; decided December 9, 1919.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered March 7, 1919, which affirmed an order of Special Term granting a motion for leave to serve a supplemental summons and complaint and to make the statutory trustees of a dissolved corporation parties defendant.

The following questions were certified: "1. In a representative action brought by a stockholder of a corporation organized under the laws of the state of Missouri, to compel the defendants to account for property of the corporation wrongfully diverted from the corporation, where it appears that during the pendency of the action the corporation was dissolved pursuant to the statutes of Missouri set forth in the papers on appeal, is the plaintiff entitled to continue the action without making the statutory trustees in dissolution parties thereto?

"2. If the foregoing question be answered in the negative, was the plaintiff, on notice to the statutory trustees in dissolution, entitled to an order making such trustees parties defendant?

"3. In a representative action brought by a stockholder of a corporation holding ninety-seven per cent of the shares of the capital stock of a corporation organized under the laws of the state of Missouri, to compel the defendants to account for property of the subsidiary corporation wrongfully diverted from the subsidiary corporation where it appears that during the pendency of the action the subsidiary corporation was dissolved pursuant to the statutes of Missouri set forth in the

papers on appeal, is the plaintiff entitled to continue the action without making the statutory trustees in dissolution parties thereto?

"4. If the foregoing question be answered in the negative, was the plaintiff, on notice to the statutory trustees in dissolution, entitled to an order making such trustees parties defendant?

"5. Was the appellant Smith a party aggrieved by the order made at Special Term on April 8, 1918, bringing in as parties defendant the foreign statutory trustees of the Doe Run Lead Company, formerly a Missouri corporation and now dissolved?"

Joseph M. Proskauer, Carlisle J. Gleason and Wesley S. Sawyer for appellant.

Samuel F. Moran and Louis B. Grant for respondents.

Order affirmed, with costs; first and third questions certified answered in the negative; second, fourth and fifth questions in the affirmative; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CARDZOZO, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ.

COLUMBIA DISTILLING COMPANY, Appellant, *v.* THE STATE OF NEW YORK, Respondent.

Columbia Distilling Co. v. State of New York, 183 App. Div. 345, affirmed.

(Argued November 19, 1919; decided December 9, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered May 8, 1918, which affirmed a judgment of the Court of Claims dismissing the plaintiff's claim for damage to its real property arising from the appropriation by the state of certain water rights and privileges alleged to be appurtenant to said property. The question was whether the easement rights to which claimant claimed title, in the 0.619 acre parcel of land, constituting a part of the bed of Bear race, appropriated by the State by appropriation map, No. 4397, viz., the right to continue to draw thereover from the Seneca Outlet "sufficient

water * * * * to make and be equivalent to two full runs of stone," were extinguished and lost by abandonment and nonuse prior to May, 1913.

George P. Decker for appellant.

Charles D. Newton, Attorney-General (*Edward J. Mone* of counsel), for respondent.

Order affirmed, with costs; no opinion.

Concur: **HISCOCK**, Ch. J., **CHASE**, **CARDOZO**, **POUND**, **McLAUGHLIN**, **CRANE** and **ANDREWS**, JJ.

NEW YORK LIFE INSURANCE AND TRUST COMPANY,
as Substituted Trustee under the Will of **ALBERT L. GALLATIN**, Deceased, Respondent, *v.* **ALBERT E. GALLATIN et al.**, Respondents, and **ROBERT LARGE et al.**, Appellants, Impleaded with Others.

N. Y. Life Ins. & Trust Co. v. Gallatin, 184 App. Div. 937, affirmed.
(Argued November 20, 1919; decided December 9, 1919.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 28, 1918, affirming a judgment in favor of defendants, respondents, entered upon the report of a referee. The will of Albert L. Gallatin, who died without issue, devised certain residuary estate, in such event, to his executors, in trust, to pay over the income to his brother for life, with a direction to pay over and transfer the principal upon his brother's death to his brother's surviving issue, and, if there were none, to the testator's cousin. The testator's brother survived him and received the income from this trust estate until his death in 1915, but the direction to the trustee to pay over and transfer the principal upon that event to the brother's surviving issue or, if there were none, to the testator's cousin, could not be carried out, for the brother left no issue and the testator's cousin was dead. The will makes no provision for that contingency, and the plaintiff, which had been substituted as trustee, thereupon brought this action to determine to whom the property belongs and to settle its accounts.

The appellants claimed that, as the will made no disposition of the property in the event which thus occurred, and as it was real estate at the time of the testator's death, it belongs to his heirs and if so it belongs to the estate of his deceased brother, and should be paid over to the appellant Large as the executor of that brother's will. The respondents claimed that the direction to pay over and transfer was equivalent to a present gift, and vested title to this property in the testator's cousin upon the testator's death, and that upon the subsequent death of the cousin, prior to the event upon which the payment and transfer was directed to be made, his title passed to them as his legatees and devisees, and entitled them to receive the fund when that event subsequently occurred.

Theodore W. Morris, Jr., for appellants.

Langdon P. Marvin for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CARDOZO, POUND,
McLAUGHLIN, CRANE and ANDREWS, JJ.

CHARLES FUTORANSKY, an Infant, by JACOB FUTORANSKY, His Guardian ad Litem, Respondent, *v.* THE NASSAU ELECTRIC RAILROAD COMPANY, Appellant.

Futoransky v. Nassau Electric R. R. Co., 176 App. Div. 915, affirmed.
(Submitted November 21, 1919; decided December 9, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 24, 1917, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant. Plaintiff, while riding on defendant's elevated railroad, rose from his seat while the train was in motion and proceeded to the rear platform of the car preparatory to leaving at the next station. Evidence on his behalf tended to show that on reaching the platform he took hold of the gate with his left hand; that at that moment there was

a very violent jerk or lurch in the movement of the car, and that this violent jerk broke his hold on the gate and threw him out into the street.

D. A. Marsh and *George D. Yeomans* for appellant.
Vine H. Smith and *Edward J. McCrossin* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CARDOWZO, POUND,
McLAUGHLIN, CRANE and ANDREWS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. GORDON F. HAMBY, Appellant.

(Argued November 24, 1919; decided December 9, 1919.)

APPEAL from a judgment of the Supreme Court rendered June 24, 1919, at a Trial Term for the county of Kings, upon a verdict convicting the defendant of the crime of murder in the first degree.

Frank X. McCaffrey for appellant.

Harry E. Lewis, District Attorney (*Ralph E. Hemstreet* of counsel), for respondent.

Judgment of conviction affirmed; no opinion.

Concur: COLLIN, HOGAN, CARDOWZO, POUND, McLAUGHLIN and ELKUS, JJ. Absent: HISCOCK, Ch. J.

M. ANNIE STANLEY, as Executrix and Trustee under the Will of WILLIAM FOSTER, Deceased, Appellant, *v. THE JAY STREET CONNECTING RAILROAD*, Respondent.

Stanley v. Jay Street Connecting Railroad, 182 App. Div. 399, affirmed.

(Argued November 24, 1919; decided December 9, 1919.)

APPEAL from a judgment entered March 12, 1918, upon an order of the Appellate Division of the Supreme Court in the second judicial department, reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and directing a dismissal of the complaint. The action was brought by William Foster, plaintiff's testator, to compel the defendant to remove its

railroad tracks immediately in front of plaintiff's premises, and for an injunction to restrain the defendant from operating its railroad in Plymouth street, Brooklyn. Plaintiff did not own the bed of the street. The Appellate Division held that "the construction, maintenance and operation of the defendant's railroad in Plymouth and Bridge streets in front of the plaintiff's property was and is a reasonable use of the said street for railroad purposes and was not and is not exclusive in its nature and leaves the said street substantially free and unobstructed."

William Wills and *Edward Ward McMahon* for appellant.

William N. Dykman for respondent.

Judgment affirmed, with costs; no opinion.

Concur: COLLIN, HOGAN, CARDOWOZ and McLAUGHLIN, JJ. Dissenting: POUND and ELKUS, JJ. Absent: Hiscock, Ch. J.

EUGENE M. TRAVIS, as Comptroller of the State of New York, Respondent, *v.* THE ANN ARBOR COMPANY, Appellant.

Travis v. Ann Arbor Co., 180 App. Div. 799, affirmed.

(Argued November 25, 1919; decided December 9, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 10, 1918, in favor of plaintiff upon the submission of a controversy under section 1279 of the Code of Civil Procedure. The question submitted was whether stock transfer taxes accrue upon the cancellation and surrender of a stock certificate standing in the name of an accommodation holder and the making out of a new stock certificate in the place thereof in the name of another accommodation holder, and the indorsement of the new certificate in blank by him, the actual ownership of the stock remaining at all times in the defendant. The Appellate Division held that the transfers having been made at the request of the defendant it must be assumed that the defendant was benefited

thereby and, therefore, a tax should be paid upon each transfer.

Hugo Kohlmann and Hamilton Rogers for appellant.
Charles D. Newton, Attorney-General (C. T. Dawes of counsel), for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, HOGAN, CARDODOZO,
POUND, McLAUGHLIN and ELKUS, JJ.

EMMA A. WOOD, Respondent, v. SEYMOUR KETCHAM, as Executor of WALKER A. WOOD, Deceased, Appellant.

Wood v. Ketcham, 184 App. Div. 927, affirmed.

(Argued November 25, 1919; decided December 9, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 27, 1918, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. The action was for a decree adjudging plaintiff to be the owner by gift of a certificate of deposit issued by the First National Bank of Moravia to defendant's testator, which was in the possession of plaintiff after testator's death but which had never been indorsed by him. The trial court held that the evidence was sufficient to establish the gift.

Hull Greenfield for appellant.

Amasa J. Parker for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, HOGAN, CARDODOZO,
POUND, McLAUGHLIN and ELKUS, JJ.

CECILIA L. BOURNE, Respondent, v. MICHAEL V. DORNEY, as Trustee under the Will of CATHERINE ALEXANDER, Deceased, Appellant.

Bourne v. Dorney, 184 App. Div. 476, affirmed.

(Argued November 25, 1919; decided December 9, 1919.)

APPEAL from a judgment entered July 3, 1918, upon an order of the Appellate Division of the Supreme Court

in the second judicial department, reversing a judgment in favor of defendant entered upon a decision of the court on trial at Special Term and directing judgment in favor of plaintiff for the relief demanded in the complaint. Charles W. Alexander, on the 15th day of February, 1886, duly made and executed his last will and testament, by which he devised his entire estate to his wife, Catherine Alexander. On December 20, 1897, he duly adopted Cecilia Croft, the plaintiff, and her sister, Lauretta Croft, who were minors, and the only children of Lauretta Croft, his deceased daughter. On January 8, 1917, Mr. Alexander died seized of the premises in the complaint described, leaving him surviving his widow and plaintiff, his adopted daughter. On August 27, 1916, Mrs. Alexander died, leaving a will by which she devised all her property, real and personal, to defendant, as trustee, for the purposes therein mentioned. Plaintiff brought this action to bar defendant, as trustee, from all interest or claim in the real property described in the complaint, upon the theory that pursuant to section 114 of the Domestic Relations Law (Cons. Laws, ch. 14), her adoption had the effect of making her a child of said Charles W. Alexander as if she were born to him on the date of her adoption, and gave her the same rights as an after-born child under section 26 of the Decedent Estate Law (Cons. Laws, ch. 13). The defendant claimed that the devise of the premises in question by Mr. Alexander to his wife was not revoked by his adoption of plaintiff after making his will, and that he, as trustee, is the owner of said premises, and that plaintiff has no title thereto.

John G. Clark for appellant.

William H. Hamilton and *Norman C. Conklin* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, HOGAN, CARDOZO, POUND, McLAUGHLIN and ELKUS, JJ.

LEWIS B. HAMILTON, as Executor of and Trustee under the Will of LUCINDA D. PHILLIPS, Deceased, Respondent, *v.* LIBBIE H. MUNCIE, Individually and as Executrix of and Trustee under the Will of LUCINDA D. PHILLIPS, Deceased, et al., Appellants, Impleaded with Others.

Hamilton v. Muncie, 182 App. Div. 630, affirmed.

(Submitted November 25, 1919; decided December 9, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered April 6, 1918, modifying and affirming as modified a judgment of Special Term construing the will of Lucinda D. Phillips, deceased. The plaintiff and defendant Libbie H. Muncie are brother and sister, children of testatrix. During her lifetime the testatrix had assisted her daughter and her husband in the erection of a sanitarium at Nos. 117 and 119 Macon street, Brooklyn. The money for this purpose was raised by mortgages on the mother's property, which mortgages the Muncies agreed to carry. Among such loans was a mortgage for \$3,000, upon the house at 767 Marcy avenue, the interest on which the Muncies paid during the testatrix's life. By the third clause of Mrs. Phillips' will she devised to her son Lewis, and his wife, "and to the survivor of them at my decease, my two houses and lots now known as Number 767 Marcy Avenue, and Number 352 Lexington Avenue, in said Brooklyn, with the appurtenances, absolutely and in fee, free and clear from all liens and encumbrances." After her death in May, 1903, the Muncies continued paying the interest. The original mortgage was called in 1906, when the Muncies, at their own cost, obtained a new loan and paid the interest thereon, and also promised to pay off the principal. In 1911 they refused further liability regarding this mortgage. Upon such refusal, this suit was brought for a construction of this third clause of the will, also to obtain a direction that the executors be required to pay off this mortgage, and that the Muncies

pay it together with the interest since 1911. After certain denials, the answer of the Muncies counterclaimed for the back payments of interest after the testatrix's death, and the expense of procuring a new mortgage. The answer of Mr. Hamilton, individually with his wife, prayed that if such mortgage with the interest payments be not repaid, then that the Hamiltons be adjudged to have a lien upon the Muncie premises at 117 and 119 Macon street to the extent of such \$3,000 mortgage and interest. The court found that this \$3,000 and the avails of certain other mortgages had been applied by the Muncies to the purchase and completion of their sanitarium. For the amount of this mortgage of \$3,000 and such interest, a lien was decreed on the sanitarium property. The Appellate Division modified the judgment by directing that "the appellants should discharge the mortgage on plaintiff's property, in respect to which appellants are adjudged to be primarily liable, and, therefore, bound to exonerate the plaintiff, both as an executor and individually, from any liability thereon."

Benjamin Cohn for appellants.

Henry L. Brant for plaintiff, respondent.

John W. Ockford and *George B. Davenport* for defendants, respondents.

Judgment affirmed, with costs; no opinion.

Concur: *Hiscock*, Ch. J., *COLLIN*, *HOGAN*, *CARDOZO*, *POUND*, *McLAUGHLIN* and *ELKUS*, JJ.

MINERVA J. HATCH, as Executrix of LUCIEN C. HATCH, Deceased, Respondent, *v.* THE PRESIDENT AND TRUSTEES OF THE VILLAGE OF MONTICELLO, Appellant.

Hatch v. President, etc., Vil. of Monticello, 184 App. Div. 450, affirmed.

(Submitted November 25, 1919; decided December 9, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered September 10, 1918, modifying and affirming as modified a judgment in favor of plaintiff entered upon

a decision of the court at a Trial Term without a jury. The action was brought by the plaintiff's testator, as assignee, to recover \$425, the agreed price of certain water mains sold and delivered to and taken over by the village of Monticello. The trial court directed a judgment in favor of the plaintiff for \$425, with interest from the 23d day of February, 1909, the date of the agreement. The Appellate Division modified the judgment, so as to allow interest only from the time the demand was made for payment which was on the 24th day of April, 1915.

Lewis N. Stanton for appellant.

Joseph I. Stahl for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, HOGAN, CARDOZO, POUND, McLAUGHLIN and ELKUS, JJ.

In the Matter of the Transfer Tax upon the Estate of
CHARLES W. WATSON, Deceased.

THE COMPTROLLER OF THE STATE OF NEW YORK,
Appellant; ANNA H. WATSON et al., as Executors,
Respondents.

(Submitted November 25, 1919; decided December 9, 1919.)

MOTION to amend remittitur. (See 226 N. Y. 384.)

Motion granted and remittitur amended by inserting therein the following: "And it appearing that the construction of the Constitution of the United States was directly involved in the appeal below before the Appellate Division of the Supreme Court, First Judicial Department, and it also appearing that the question whether that statute of the State of New York, section 2 of chapter 700 of the Laws of 1917, being entitled section 221-B 'Additional Tax on Investments in certain cases' and being a part of Article X of the Tax Law of the State of New York, contravenes and is repugnant to the provisions of the Constitution of the United States, including the equal protection of the laws clause and

due process clause of said Constitution contained in the 14th amendment, was presented to and determined by the Court of Appeals."

WALTER B. MILKMAN, as Trustee in Bankruptcy of **JOSE CASESA**, Appellant, *v.* **JOSE CASESA et al.**, Respondents.

(Submitted December 8, 1919; decided December 12, 1919.)

Motion to amend remittitur denied, without costs. (See 227 N. Y. 615.)

MATILDA HOYKENDORF, Appellant, *v.* **BRADLEY CONTRACTING COMPANY**, Respondent.

(Submitted December 8, 1919; decided December 12, 1919.)

Motion for re-argument or to amend remittitur denied, with ten dollars costs and necessary printing disbursements. (See 227 N. Y. 204.)

NICKOLAUS LABERHEIM, Appellant, *v.* **GEORGE EHRET**, Respondent.

Laberheim v. Ehret, 177 App. Div. 884, appeal dismissed.

(Submitted December 8, 1919; decided December 12, 1919.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 20, 1918, affirming a judgment in favor of defendant entered upon a verdict in an action to recover for personal injuries alleged to have been sustained through the negligence of the defendant.

The motion was made upon the ground that the affirmance by the Appellate Division was unanimous and permission to appeal had not been obtained.

Robert D. Elder for motion.

Charles Caldwell opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent
v. RICHARD HARRISON, Appellant.

(Argued November 24, 1919; decided December 12, 1919.)

APPEAL from a judgment of the Supreme Court rendered January 31, 1919, at a Trial Term for the county of New York, upon a verdict convicting the defendant of the crime of murder in the first degree.

Joseph R. Truesdale for appellant.

Edward Swann, District Attorney (*Robert C. Taylor* of counsel), for respondent.

Judgment of conviction affirmed; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, HOGAN, CARDODOZ, POUND, McLAUGHLIN and ELKUS, JJ.

MARTIN FULTS, as Administrator of the Estate of DORA E. FULTS, Deceased, Respondent, *v.* NEW YORK CENTRAL RAILROAD COMPANY, Appellant.

Fults v. N. Y. Central R. R. Co., 187 App. Div. 922, affirmed.

(Argued November 26, 1919; decided December 12, 1919.)

APPEAL from a judgment entered January 27, 1919, upon an order of the Appellate Division of the Supreme Court in the fourth judicial department, which reversed a judgment in favor of defendant entered upon an order of the court at a Trial Term granting a reserved motion for a nonsuit after rendition of a verdict in favor of plaintiff and directed judgment on the verdict, in an action to recover for the death of plaintiff's intestate alleged to have been occasioned through the negligence of defendant. The accident occurred at a grade crossing in the town of Theresa, Jefferson county, when a carriage drawn by a horse in which intestate was riding, owned and being driven by her brother-in-law, was struck by one of the defendant's trains.

Henry Purcell for appellant.

N. F. Breen for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, HOGAN, CARDODOZ, POUND, McLAUGHLIN and ELKUS, JJ.

THE RAYMOND-HADLEY CORPORATION, Respondent and Appellant, *v.* BOSTON AND MAINE RAILROAD et al., Appellants and Respondents.

Raymond-Hadley Corp. v. Boston & Maine R. R., 186 App. Div. 341, affirmed.

(Argued December 1, 1919; decided January 6, 1920.)

CROSS-APPEALS from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 18, 1919, modifying and affirming as modified a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury. This action was brought by plaintiff, an exporter of flour, to recover from the defendant carrier \$4,965.31 alleged storage charges which defendant assessed and collected from plaintiff, under protest, on 109 carloads of flour, arriving at Boston, Mass., during the period December 17, 1915, to February 9, 1916, for export. Forty-two of the cars were delivered at their destination, "Mystic Wharf," and unloaded. At the expiration of the free storage period, plaintiff having failed to load the flour on a vessel and defendant requiring the pier space, the latter reloaded the flour on cars and transported it to a public warehouse and thereafter on arrival of a vessel returned it to the wharf for loading. A charge was made for such reloading, switching and warehouse charges amounting to \$3,142.16, which plaintiff seeks to recover. The remaining 67 cars were held in defendant's yards in Boston and not actually delivered at the wharf until the arrival of the vessel on which the flour was loaded. The defendant charged for storage on the flour, after the expiration of the free storage period, though it was still in the cars. The trial court directed judgment for plaintiff for \$3,142.16, with interest and costs, on the ground that no authority existed in the carrier's filed tariffs for the assessment of this portion of the charge; but denied relief as to the sum of \$1,823.21, on the ground that this portion of the charge was assessed pursuant to tariff authority. Both parties appealed to the Appellate Division, the

defendants from the whole of the judgment, and the plaintiff from only so much thereof as limited its recovery to \$3,142.16. The Appellate Division modified the judgment of the trial court by deducting from the amount of plaintiff's recovery the sum of \$599.44, the amount of charges that would have accrued had the flour remained on the dock, with interest from April 29, 1916, and by increasing the judgment by the sum of \$1,823.21, with interest thereon from April 29, 1916, the sum collected for storage on the 67 cars held in the yards but not actually delivered at their destination.

Edward J. A. Rook for defendants, appellants and respondents.

Neil D. Cullom for plaintiff, respondent and appellant.

Judgment affirmed without costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, McLAUGHLIN and ANDREWS, JJ.; CRANE, J., votes to modify judgment so as to allow defendant storage charges on the flour held in the 67 cars.

GEORGE OGLE, as Administrator of the Estate of JOHN OGLE, Deceased, Respondent, *v.* CHARLES M. ROSENTHAL, Appellant.

Ogle v. Rosenthal, 188 App. Div. 882, affirmed.

(Argued December 1, 1919; decided January 6, 1920.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 10, 1919, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for the death of plaintiff's intestate alleged to have been occasioned through the negligence of defendant. The intestate, a boy nine years of age, while crossing Amsterdam avenue between One Hundred and Twenty-eighth and One Hundred and Twenty-ninth streets in the city of New York was struck by defendant's automobile and killed.

Theodore H. Lord and Fred H. Rees for appellant.

Nathan D. Stern for respondent.

Judgment affirmed, without costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN,
McLAUGHLIN, CRANE and ANDREWS, JJ.

ANNA A. DE MARIA, as Administratrix of the Estate of
MIKE DE MARIA, Respondent, *v.* NEW YORK CENTRAL
RAILROAD COMPANY, Appellant.

De Maria v. N. Y. Central R. R. Co., 180 App. Div. 573, affirmed.
(Argued December 1, 1919; decided January 6, 1920.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 26, 1917, affirming a judgment in favor of plaintiff entered upon a verdict in an action, under the Federal Employers' Liability Act, to recover for the death of plaintiff's intestate alleged to have been occasioned through the negligence of defendant, his employer. The intestate, a trackwalker at North White Plains, while assisting during a snow storm in cleaning out a switch, was struck by a backing freight locomotive and killed. Defendant contended that intestate was employed as a watchman and that it was his special duty to watch for approaching trains so as to warn those employed about the tracks.

John F. Brennan for appellant.

Thomas J. O'Neill and *Leonard F. Fish* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN,
McLAUGHLIN, CRANE and ANDREWS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
JOSEPH MILANO, Appellant.

(Argued December 2, 1919; decided January 6, 1920.)

APPEAL from a judgment of the Supreme Court rendered January 25, 1919, at a Trial Term for the county of Bronx upon a verdict convicting the defendant of the crime of murder in the first degree.

George Gordon Battle for appellant.

Francis Martin, District Attorney (Charles B. McLaughlin and Albert Cohn of counsel), for respondent.

Judgment of conviction affirmed; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, McLAUGHLIN, CRANE and ANDREWS, JJ.

BECKIE COHEN, as Administratrix of the Estate of BENJAMIN COHEN, Deceased, Respondent, *v.* NEW YORK, ONTARIO AND WESTERN RAILWAY COMPANY, Appellant.

Cohen v. N. Y., Ontario & Western Ry Co., 187 App. Div. 934, affirmed.

(Argued December 2, 1919; decided January 6, 1920.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 17, 1919, modifying and affirming as modified a judgment in favor of plaintiff entered upon a verdict in an action to recover for the death of plaintiff's intestate alleged to have been occasioned through the negligence of defendant. The intestate was killed by one of defendant's trains while crossing its tracks in the village of Mountaintdale. The act of negligence charged in the complaint is, "that said accident and collision was due to the negligence, carelessness and recklessness of the defendant, its agents, employees and flagman in arresting the movement of the plaintiff's intestate while attempting to cross said tracks, and in propelling or pushing him forward so that he fell in front of an oncoming train." The defendant denied that its employees interfered with the passage of the plaintiff's intestate, and asserted that the accident was the ordinary crossing collision between a careless pedestrian who needlessly took chances and who was struck by the approaching train, which the intestate not only could, but did see, in time to have avoided the collision in the exercise of ordinary care.

John Bright, Thomas Watts and Albert N. Oakes for appellant.

Moses Feltenstein and Louis A. Rosen for respondent.

Judgment affirmed, with costs, under the provisions of section 1317 of the Code of Civil Procedure; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, McLAUGHLIN, CRANE and ANDREWS, JJ.

ANNIE LEVINE, as Administratrix of the Estate of ISAAC LEVINE, Deceased, Respondent, *v.* NEW YORK RAILWAYS COMPANY, Appellant.

Levine v. N. Y. Railways Co., 188 App. Div. 887, affirmed.

(Argued December 2, 1919; decided January 6, 1920.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 2, 1919, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for the death of plaintiff's intestate alleged to have been occasioned through the negligence of the defendant. Intestate, while crossing from west to east on Broadway, midway between Broome and Spring streets in the city of New York, was crushed to death between the sides of two of defendant's cars as they passed each other in opposite directions, one bound north and the other south. The complaint charged negligence on the part of defendant in its operation of the cars in question and also in its placing its tracks so close together that there was not room for a person to stand in safety between cars moving in opposite directions. The defense was contributory negligence.

B. H. Ames and James L. Quackenbush for appellant.

John C. Robinson and Gilbert D. Steiner for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, McLAUGHLIN, CRANE and ANDREWS, JJ.

THOMAS JOHNSON, as Administrator of the Estate of THOMAS JOHNSON, Deceased, Respondent, *v.* WEST-CHESTER STREET RAILROAD COMPANY, Appellant.

Johnson v. Westchester Street R. R. Co., 184 App. Div. 912, appeal dismissed.

(Argued December 2, 1919; decided January 6, 1920.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 25, 1918, reversing upon the law and the facts a judgment in favor of plaintiff entered upon a verdict and granting a new trial in an action to recover for the death of plaintiff's intestate alleged to have been occasioned through the negligence of defendant.

John F. Brennan and Thomas F. Curran for appellant.
Eugene F. McKinley for respondent.

Appeal dismissed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, McLAUGHLIN and ANDREWS, JJ. Not voting: CRANE, J.

RAY BURMASTER, Appellant, *v.* THE STATE OF NEW YORK, Respondent.

Burmaster v. State of New York, 186 App. Div. 131, affirmed.

(Argued December 3, 1919; decided January 6, 1920.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 28, 1919, affirming a judgment of the Court of Claims dismissing the plaintiff's claim for damages to his real property caused by the construction and maintenance by the state of New York of a dike along the highway leading from the Cattaraugus Indian Reservation to the village of Irving, N. Y., causing the waters of Cattaraugus creek, during flood time, to be diverted upon the land of the claimant. The Appellate Division held: "This is not a case of collecting surface waters and precipitating them upon a neighbor; it is merely the exercise of a right of the state so to construct its highways that they will not be destroyed by waters

flowing upon them from the premises of the claimant; and we think the Court of Claims was bound, under the law, to decline to make an award in this case."

Harry D. Williams for appellant.

Charles D. Newton, Attorney General (Jerome L. Cheney and Blaine F. Sturgis of counsel), for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, McLAUGHLIN, CRANE and ANDREWS, JJ.

ANNA CAPAZZI, as Administratrix of the Estate of JOSEPH CAPAZZI, Deceased, Appellant, *v.* EMPIRE GAS AND ELECTRIC COMPANY, Respondent.

Capazzi v. Empire Gas & Electric Co., 182 App. Div. 909, affirmed.
(Argued December 3, 1919; decided January 6, 1920.)

APPEAL from a judgment, entered January 18, 1918, upon an order of the Appellate Division of the Supreme Court in the fourth judicial department, reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint in an action to recover for the death of plaintiff's intestate alleged to have been occasioned through the negligence of the defendant. The complaint alleged that under an arrangement between the United States Radiator Corporation, of which this decedent was an employee, and this defendant, it furnished electricity to the radiator corporation, delivered to them over a line of poles and wires; that upon the outside of the plant of the radiator corporation there was a transformer; that by the negligent construction, or operation, or condition of this transformer, or of certain cut-outs, the whole strength of the current which came up to this transformer instead of being reduced thereby was passed on over the wires and into the building of the radiator corporation, and came in contact with the body of the decedent and caused his death.

W. B. Matterson for appellant.

William H. Harding for respondent.

Judgment affirmed, with costs; no opinion.
Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN,
McLAUGHLIN, CRANE and ANDREWS, JJ.

ROSE FERRARO et al., as Administratrices of the Estate of JAMES FERRARO, Deceased, Respondents, v. CHRISTIAN F. TERRENCE et al., Copartners under the Firm Name of C. F. TERRENCE & SON, Appellants.

Ferraro v. Terrence, 188 App. Div. 934, affirmed.
(Argued December 3, 1919; decided January 6, 1920.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 2, 1919, unanimously affirming a judgment in favor of plaintiffs entered upon a verdict in an action to recover for the death of plaintiffs' intestate alleged to have been occasioned through the negligence of defendants, his employers. The intestate was killed while in the hold of a ship, which the defendants had contracted to load, by an iron beam, which rested in slots at the side of the hatch at the between-decks, being caused to fall into the hold by reason of the hook at the end of the fall used in loading catching underneath it, and lifting it out of its ockets. The negligence complained of was the alleged failure to furnish a safe place in which to work, in that the said beam which fell should have been securely fastened in place, or should have been removed before the work of loading was commenced.

Bertrand L. Pettigrew and Walter L. Glenney for appellants.

Frank F. Davis and Charles E. Russell for respondents.

Judgment affirmed, with costs; no opinion.
Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN,
McLAUGHLIN, CRANE and ANDREWS, JJ.

GEORGE McM. GODLEY, as Executor of ELIZABETH McM. GODLEY, Deceased, Appellant, *v.* CRANDALL & GODLEY COMPANY et al., Respondents.

Godley v. Crandall & Godley Co., 181 App. Div. 75, affirmed.

(Argued December 3, 1919; decided January 6, 1920.)

APPEAL from a judgment, entered February 1, 1918, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and directing a dismissal of the complaint in a stockholders' action on behalf of the corporation to recover moneys of the corporation alleged to have been illegally paid out by its directors. The Appellate Division directed a dismissal of the complaint on the ground that it failed to allege that plaintiff had, before commencing the suit, requested the then directors to bring the action in the name of the corporation and had been refused, or any facts showing that it would have been futile to make such a demand.

W. Russell Osborn and David Bennett King for appellant.

Edgar T. Brackett, James J. Allen, William E. Bennett and *Hiram C. Todd* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, McLAUGHLIN, CRANE and ANDREWS, JJ.

HERMAN L. EDGAR et al., Respondents, *v.* RHINELANDER WALDO, Appellant, and CHARLES D. NEWTON, as Attorney-General, et al., Respondents.

Eagar v. Waldo, 186 App. Div. 882, affirmed.

(Argued December 4, 1919; decided January 6, 1920.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 18, 1918, affirming a judgment entered upon a decision of the court on trial at Special Term construing the seventh article of the will of Charles E. Rhinelander, deceased, which reads as

follows: "All the rest, residue, and remainder of my estate, both real, personal, and mixed, and wheresoever the same may be situated, including lapsed and void legacies and all my estate the disposition of which may for any reason fail, I give, devise, and bequeath to Benjamin Aymar Sands and Herman LeRoy Edgar, and to their survivor. I desire them to distribute my said residuary estate among such religious, charitable, and educational corporations as they may designate." It was claimed by the defendant, appellant, Waldo that this clause attempted to create a trust of the residuary estate, which was void for indefiniteness, and that as the sole heir-at-law and next of kin of the testator he was entitled to the entire residuary estate as intestate property. The trial court decided that the seventh article of the will operated as a gift of the entire residuary estate to the testator's executors, Mr. Sands and Mr. Edgar, individually, free and clear of any trust or use whatsoever.

George W. Wickersham and Thomas B. Gilchrist for appellant.

Francis M. Scott, Middleton S. Borland and Charles H. Edwards for plaintiffs, respondents.

Charles Howland Russell, Grenville T. Emmet, John F. Curran, Joseph H. Choate, Jr., Sinclair Hamilton, Charles E. Hotchkiss and Sydney G. Soons for defendants, respondents.

Charles D. Newton, Attorney-General (Robert P. Beyer of counsel), for Attorney-General, respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, McLAUGHLIN, CRANE and ANDREWS, JJ.

J. FREDERICK KERNOCHAN, as Executor of EDWARD M. KNOX, Deceased, Appellant, *v.* THE FARMERS' LOAN AND TRUST COMPANY, Individually and as Trustee under the Will of EDWARD M. KNOX, Deceased, Defendant, MARY E. LITTLE et al., Appellants, and THE BOARD OF FOREIGN MISSIONS OF THE METHODIST EPISCOPAL CHURCH, Respondent.

Kernochan v. Farmers' Loan & Trust Co., 187 App. Div. 668, affirmed.
(Argued December 8, 1919; decided January 6, 1920.)

APPEAL from a judgment, entered June 7, 1919, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment of the court at Special Term holding invalid a legacy under the will of Edward M. Knox, deceased, and directing judgment sustaining and directing payment of said legacy. By the fifth clause of his will testator bequeathed "to the Charles Knox Memorial (Methodist) Church, in Manila, Philippine Islands, the sum of ten thousand dollars (\$10,000)." The defendant Board of Foreign Missions of the Methodist Episcopal Church, while conceding that there is no *Charles Knox* Memorial Church in existence, nevertheless in substance contended that, since there was a church edifice at Manila, upon the corner stone of which was inscribed "Knox Memorial — First Methodist Episcopal Church," toward the erection of which the testator had made some contribution, and which church was a mission church under the control of said board, and referred to in publications of said board as the "Knox Memorial," therefore that such church was meant by testator, and that, although not incorporated, it was a branch of the Board of Foreign Missions of the Methodist Episcopal Church, and so that said board was entitled to said legacy.

J. Frederick Kernochan and Henry F. Miller for plaintiff, appellant.

Henry F. Miller and Robert M. Miller for defendants, appellants.

William L. Ransom, Nathan Ottinger and William O. Gantz for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., HOGAN, CARDODOZ, POUND,
McLAUGHLIN, ANDREWS and ELKUS, JJ.

THE FIRST NATIONAL BANK OF BLANCHESTER, Appellant,
v. EDWARD STENGEL, Respondent.

First Nat. Bank of Blanchester v. Stengel, 185 App. Div. 906,
affirmed.

(Argued December 9, 1919; decided January 6, 1920.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 8, 1918, affirming a judgment in favor of defendant entered upon a decision of the court at a Trial Term, a jury having been waived. This action is the outgrowth of another action wherein Harry S. Gray was plaintiff and Dewey Brothers Company, defendant. In said action a warrant of attachment was duly issued on March 28, 1917. Defendant in this action, as sheriff, attached a car of grains, moving in interstate commerce, having been consigned by Dewey Brothers Company to themselves at Springville, N. Y., with directions to notify J. H. Gray Milling Company. The goods were levied upon and taken into the custody of the defendant sheriff upon the 28th day of March, 1917, but the bill of lading was not. Dewey Brothers Company, learning of the attachment, recalled the bill of lading and made out a new draft, and deposited the same as a portion of a deposit totaling \$6,211.69, with plaintiff on the 31st day of March, 1917. The deposit slip had printed thereon, "Checks and drafts on other banks credited subject to payment." The draft and bill of lading were returned to Springville, N. Y., and on April 2, 1917, the warrant of attachment having been amended, the sheriff took into his custody the draft and bill of lading. Dewey Brothers Company defaulted in the original action, the goods were sold and plaintiff instituted this action upon the theory that the sheriff by the levy converted its goods.

Frank Gibbons for appellant.

William W. Dickinson for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., HOGAN, CARDENZO, POUND,
McLAUGHLIN, ANDREWS and ELKUS, JJ.

MICHAEL J. LEAHY, Respondent, *v.* CHESTER W. FAIRLIE,
as Trustee in Bankruptcy of LUCIUS ENGINEERING
COMPANY, Appellant.

Leahy v. Lucius Engineering Co., 186 App. Div. 354, affirmed.

(Argued December 10, 1919; decided January 6, 1920.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 7, 1919, affirming a judgment in favor of plaintiff entered upon a verdict. This action was originally brought against the Lucius Engineering Company to recover damages claimed to have been sustained by the plaintiff by the abandonment by that company of a sub-contract whereby it agreed to haul, distribute, erect, rivet and paint the metal work covered by items 19 and 20 in the schedule of unit prices contained in the principal contract between the plaintiff and the Interborough Rapid Transit Company for the erection of an elevated structure known as the Webster Avenue line, Section Number 9-B, of the Dual Rapid Transit Railroad in the city of New York. After the decision by the Appellate Division an order was entered continuing the action in the name of Chester W. Fairlie, as trustee in bankruptcy of said Lucius Engineering Company.

Paul Bonyngé for appellant.

Abram J. Rose and *Alfred C. Petté* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., HOGAN, CARDENZO, POUND,
McLAUGHLIN, ANDREWS and ELKUS, JJ.

WILLIAM J. DEMPSEY, Plaintiff, *v.* MOUNT SINAI HOSPITAL et al., Defendants, THOMPSON-STARRETT COMPANY, Respondent, and WILLIAM NUTLEY et al., Appellants.

Dempsey v. Mount Sinai Hospital, 186 App. Div. 334, affirmed.

(Argued December 10, 1919; decided January 6, 1920.)

APPEAL from a judgment, entered March 26, 1919, upon an order of the Appellate Division of the Supreme Court in the first judicial department reversing a judgment entered upon a decision of the court on trial at Special Term in an action to foreclose a mechanic's lien and directed a dismissal of the liens of the appellants herein. The defendant Mount Sinai Hospital entered into a contract with the defendant Thompson-Starrett Company to make certain improvements upon its hospital property. The Thompson-Starrett Company made a contract with the defendant the F. H. Chapman Contracting Company to do the rock and earth excavation for the improvement. This defendant Chapman Company abandoned the work it was doing for the Thompson-Starrett Company on September 18, 1916. The three appellants had claims against the Chapman Company at the time of the abandonment of the work by that company. At the time of this abandonment there were no moneys due from the Thompson-Starrett Company to the Chapman Company, nor did any moneys subsequently become due. Progress payments were to be made of eighty-five per cent of the value of the work at contract rates as the work progressed. The remaining fifteen per cent was to be paid to it forty days after the entire completion of the work. The appellants claim that their liens attach to this reserve notwithstanding it was not due and notwithstanding that it cost the Thompson-Starrett Company more to complete the work than the contract price.

Harry Lesser, Moses Cohen and Patrick J. McDonald for appellants.

Frederick Hulse for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., HOGAN, CARDZOZO, McLAUGHLIN, ANDREWS and ELKUS, JJ. Dissenting: POUND, J.

THE BANKERS SERVICE CORPORATION, Respondent, v. THE SECOND NATIONAL BANK OF ALLEGHENY, Appellant.

Bankers Service Corp. v. Second Nat. Bank of Allegheny, 181 App. Div. 655, affirmed.

(Argued December 10, 1919; decided January 6, 1920.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered February 1, 1918, reversing a judgment in favor of defendant entered upon a verdict directed by the court and granting a new trial. Plaintiff and the First National Bank of Allegheny, whose assets have been transferred to defendant which has assumed all of its obligations and liabilities, entered into a contract in writing whereby the plaintiff agreed to procure for the bank a certain number of new accounts and the bank agreed to pay plaintiff a certain amount for each account accepted. Plaintiff procured the accounts and the bank paid the agreed compensation for a part thereof. Thereafter it notified the plaintiff that certain of its accounts were undesirable and that it would refuse to pay therefor. This action was brought to recover the amount unpaid. Defendant counterclaimed for an amount which it claimed it had paid on undesirable accounts. The contract contained the following provision: "It is understood and agreed that the bank has the right to refuse payment for depositors accepted from the corporation where such accounts in the judgment of the bank are undesirable." The Appellate Division, construing the contract, held that it was necessary for the bank in order to take advantage of the clause of the contract entitling it to refuse payment for undesirable accounts, to cause the depositor to sever his connection with the bank and withdraw his deposit, and on this ground reversed the judgment and directed a new trial.

Charles Adkin Baker for appellant.

Clifford H. Owen for respondent.

Order affirmed and judgment directed for plaintiff on its claim and dismissing defendant's counterclaim in

accordance with the stipulation, with costs in all courts; no opinion.

Concur: HISCOCK, Ch. J., HOGAN, CARDOZO, POUND,
McLAUGHLIN, ANDREWS and ELKUS, JJ.

FLORENCE B. ENNIS, Appellant, v. HOWARD CHICHESTER,
Individually and as Executor of WILLIAM H. BROWN,
Deceased, et al., Respondents.

Ennis v. Chichester, 187 App. Div. 53, affirmed.

(Argued December 10, 1919; decided January 6, 1920.)

APPEAL from a judgment, entered May 8, 1919, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and directing a dismissal of the complaint. The action was to establish and enforce an alleged oral contract said to have been made by William H. Brown, now deceased, with Robert McD. Cugle, the father of plaintiff, in or about the year 1890, whereby the said Brown agreed that the plaintiff should, upon the death of said William H. Brown, receive all of his estate.

Samuel Seabury, James E. Duross and William Steele Grey for appellant.

Francis M. Scott and Henry Thompson for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CARDOZO, POUND, McLAUGHLIN, ANDREWS and ELKUS, JJ. Dissenting: HOGAN, J.

MARGARET GRADY, as Administratrix of the Estate of MICHAEL GRADY, Deceased, Appellant, v. LEHIGH VALLEY RAILROAD COMPANY, Respondent.

Grady v. Lehigh Valley R. R. Co., 188 App. Div. 983, affirmed.

(Argued December 11, 1919; decided January 6, 1920.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered July 29, 1919, affirming a judgment in favor of defendant entered upon a dismissal of the complaint

by the court at a Trial Term in an action to recover for the death of plaintiff's intestate alleged to have been occasioned through the negligence of defendant. The intestate was a section foreman in the employ of defendant and was killed as the result of the collision of a motor rail car on which he was riding with his gang and a light engine. The trial court granted a nonsuit on the ground of assumption of risk.

Mortimer L. Sullivan for appellant.

Halsey Sayles for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., HOGAN, CARDOZO, POUND,
McLAUGHLIN, ANDREWS and ELKUS, JJ.

WILHELMINE E. SKOU, Appellant, *v.* THE TOWN OF
NORTH HEMPSTEAD, Respondent.

Skou v. Town of North Hempstead, 186 App. Div. 960, affirmed.

(Argued December 11, 1919; decided January 6, 1920.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 26, 1918, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term. The complaint alleged that plaintiff is the owner of certain lands in the town of North Hempstead; that in January, 1916, defendant, "its agents, servants, employees and contractors," wrongfully and illegally and without the consent or knowledge of plaintiff, entered upon said lands, removed trees and earth, excavated and constructed "thereon, therein, thereunder and within said lands, certain structures, sewers, manholes and lay certain pipes beneath the surface, on the surface and extending above the surface," and did destroy the property and prevent the usual use and enjoyment thereof by plaintiff; that since May 10, 1916, defendant has continuously maintained and still maintains said wrongful and unlawful possession of said lands and has likewise continuously wrongfully and unlawfully maintained the use and occupation thereof

up to the present time, to the exclusion and damage of plaintiff; that such use for sewer purposes is permanent and is an appropriation of the land. Judgment was demanded for the damage sustained.

Lilian Herbert Andrews and *George J. Kilgen* for appellant.

Erastus J. Parsons for respondent.

Judgment affirmed, with costs; no opinion.

Concur: *Hiscock*, Ch. J., *Hogan*, *Cardozo*, *Pound*, *McLaughlin*, *Andrews* and *Elkus*, JJ.

CATHERINE E. VAN INGEN, Respondent, v. THE JEWISH HOSPITAL OF BROOKLYN, Appellant.

Van Ingen v. Jewish Hospital of Brooklyn, 182 App. Div. 10, affirmed.
(Argued December 11, 1919; decided January 6, 1920.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 1, 1918, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant. Plaintiff while riding in an automobile was injured as the result of a collision with a motor ambulance owned by defendant and being used in bringing a patient to the hospital. The defenses were, *first*, that as a charitable corporation the defendant was not responsible for the negligence of its servants, and *second*, that at the time of the accident it was acting as an agent of the city of New York in transporting a charity patient and in so doing was performing a governmental function, and, therefore, was not responsible for the negligence of its chauffeur.

Frank Verner Johnson and *Amos H. Stephens* for appellant.

Frank W. Holmes for respondent.

Judgment affirmed, with costs; no opinion.

Concur: *Hiscock*, Ch. J., *Hogan*, *Cardozo*, *Pound*, *McLaughlin*, *Andrews* and *Elkus*, JJ.

PETER J. PIERSON, Respondent, *v.* INTERBOROUGH RAPID TRANSIT COMPANY, Appellant.

Pierson v. Interborough Rapid Transit Co., 184 App. Div. 678, affirmed.

(Argued December 12, 1919; decided January 6, 1920.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 13, 1918, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant. Plaintiff was employed as a guard on the defendant's railroad. On the day of the accident, his train having arrived at its terminal station, he was relieved from duty, another guard took his place and he walked out of the train, of which his car had been a part, and up to the front car, boarded it, went to the front of it, sat down and began reading his newspaper, and so remained until the accident occurred. He was at the time on his way to keep an appointment he had that day with his dentist. Defendant contended that the plaintiff had no cause of action at common law, his sole remedy being under the Workmen's Compensation Law; and that the plaintiff was not a passenger, and that the maxim *res ipsa loquitur* does not apply.

The courts below held that defendant owed plaintiff its duty to a passenger.

Frederick J. Moses and James L. Quackenbush for appellant.

John C. Robinson and Frank L. Tyson for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., HOGAN, CARDZOZO, POUND, McLAUGHLIN, ANDREWS and ELKUS, JJ.

EFFIE FISHER, Appellant, *v.* **ISAAC FISHER**, Defendant, and **CHARLES H. HULETT**, as Administrator of the Estate of **ABRAM FELKER**, et al., Respondents.

Fisher v. Fisher, 184 App. Div. 930, affirmed.

(Argued December 4, 1919; decided January 13, 1920.)

APPEAL from a judgment, entered June 7, 1918, upon an order of the Appellate Division of the Supreme Court in the fourth judicial department, reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint in an action to partition real property. Plaintiff claimed title under an alleged oral agreement whereby she was to have the property in return for certain services to be performed for the then owner. The defendants, respondents, are heirs and next of kin of said owners now deceased, and claim the property by right of descent. The Appellate Division held: "1. That the finding of the making of a contract is not supported by such clear and convincing evidence as is required under the rule applicable to cases of this nature. 2. That even if such contract was made, the evidence is insufficient to show a performance by plaintiff."

Edward W. Clegg for appellant.

Charles T. Ennis and *Myric M. Kelly* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: **HISCOCK**, Ch. J., **CHASE**, **COLLIN**, **HOGAN**, **McLAUGHLIN**, **CRANE** and **ANDREWS**, JJ.

ANDRES LAJAM, Respondent, *v.* **ABRAHAM SAHDALA & SON CORPORATION**, Appellant.

Lajam v. Sahdala & Son Corporation, 188 App. Div. 965, affirmed.
(Submitted December 5, 1919; decided January 13, 1920.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 30, 1919, affirming a judgment in favor of plaintiff entered upon a verdict. This action was brought to recover damages for the non-acceptance of a draft. The complaint alleged in substance that the plaintiff was a

trader doing business in the Dominican Republic and in New York city and other places, and that the defendant was engaged in the import and export commission and banking business in the city of New York; that in December, 1914, the defendant, as an inducement to procure the plaintiff to trade with the defendant, opened a credit in defendant's establishment in New York in favor of plaintiff and without limitation of time, in the sum of \$2,000, to be utilized by the plaintiff by means of drafts or bills of exchange to be drawn by plaintiff on defendant, payable at sixty days' sight; that thereafter plaintiff drew his draft against defendant at sixty days which draft was duly presented for acceptance but that defendant "negligently, wilfully and wrongfully and in gross violation of its duty to plaintiff in the premises refused to accept the same;" that said draft was accordingly protested and the cost thereof paid by the plaintiff, who by reason of the premises suffered loss and damages to his credit and business standing, and great mental anxiety and suffering. As a defense defendant alleged that the alleged credit was merely an unaccepted offer of credit, and that the plaintiff never accepted or consented to the said offer and never paid the defendant any money, property or other consideration for said offer of credit, and that the minds of the parties never met; and further, that on or about March 26, 1915, and before the said draft was drawn, the defendant notified plaintiff that it withdrew and canceled the offer of credit.

Benjamin Patterson and George Bell for appellant.

Perry Allen for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN,
McLAUGHLIN, CRANE and ANDREWS, JJ.

In the Matter of the Accounting of JAMES S. MENG, as Executor of HENRY BISCHOFF, Deceased, Respondent and Appellant.

ELIZABETH BISCHOFF, Appellant and Respondent; MORGAN J. O'BRIEN, JR., as Special Guardian, Respondent.
(Submitted January 5, 1920; decided January 13, 1920.)

Motions by James S. Meng, as Executor, and by Annie L. Meng for re-argument each denied, with ten dollars costs and necessary printing disbursements. (See 227 N. Y. 264.)

SUSIE V. HOLLENDER, as Administratrix with the Will Annexed of JOHN A. GOODENOUGH, Deceased, Appellant, v. FREDERICK H. WALLACE, as Administrator of CHRISTOPHER D. WALLACE, Deceased, Respondent.

(Submitted January 5, 1920; decided January 13, 1920.)

Motion for re-argument denied, with ten dollars costs and necessary printing disbursements. (See 227 N. Y. 614.)

In the Matter of the Application of INTERNATIONAL RAILWAY COMPANY, Respondent, for a Writ of Mandamus against THE PUBLIC SERVICE COMMISSION, SECOND DISTRICT.

THE CITY OF BUFFALO, Appellant.

(Submitted January 5, 1920; decided January 13, 1920.)

Motion for re-argument denied, with ten dollars costs and necessary printing disbursements. (See 226 N. Y. 474.)

WILLIAM J. SCHIEFFELIN, Respondent, v. JOHN F. HYLAN et al., Constituting the Board of Estimate and Apportionment of the City of New York, et al., Appellants.

(Submitted January 5, 1920; decided January 13, 1920.)

Motion for re-argument denied, with ten dollars costs and necessary printing disbursements. (See 227 N. Y. 593.)

VALENTINE E. MACY et al., as Substituted Trustees under the Will of JOSIAH MACY, JR., Deceased, Respondents, v. KATE M. LADD, Appellant and Respondent, and VALENTINE E. MACY et al., Respondents and Appellants.

Decedent's estate — trust — apportionment between life beneficiaries and remaindermen of subsidiary stocks distributed on dissolution of holding corporation, stock of which formed part of trust fund.

This action was brought by trustees under a will for instructions as to the disposition to be made of securities distributed to them by the Standard Oil Company upon its dissolution and in regard to certain stock dividends declared and issued by several of the subsidiaries subsequent to the distribution. The judgment of the Appellate Division is modified in accordance with the principles laid down in *U. S. Trust Co. of N. Y. v. Heye* (224 N. Y. 242).

Macy v. Ladd, 182 App. Div. 216, modified.

(Argued November 19, 1919; decided January 13, 1920.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 17, 1918, modifying and affirming as modified a judgment entered upon the report of a referee.

Richard V. Lindabury and William W. Ladd for Kate M. Ladd, appellant and respondent.

John A. Garver and Cortland Betts for Valentine E. Macy et al., respondents and appellants.

Ernest P. Hoes and Frank L. Hall for Josiah M. Willets et al., respondents and appellants.

Albridge C. Smith for Valentine E. Macy et al., as trustees, respondents.

Per Curiam. The judgments of the courts below determine the respective rights of the parties in the stocks of the so-called Standard Oil subsidiaries distributed in 1911 and 1912 pursuant to the decision of the Federal Supreme Court. (*Standard Oil Co. of N. J. v. United States*, 221 U. S. 1.)

This action was brought by the substituted trustees under the will of Josiah Macy, Jr., deceased, of the trust thereby created for the benefit of the defendant Kate M.

Ladd and remaindermen for instructions in regard to the stock so distributed, and in regard to certain stock dividends and rights declared and issued by several of the subsidiaries subsequent to the distribution.

The general principles governing this distribution were decided by this court in the case of *U. S. Trust Co. of N. Y. v. Heye* (224 N. Y. 242, modifying 181 App. Div. 544), and it is needless to restate them. While it is urged that the evidence is not identical, the history of the various stocks is essentially the same. It is difficult to reach different conclusions in two cases so closely connected. The decision of this court in the *Heye* case had not been announced when the Appellate Division decided the case at bar. The latter court, therefore, followed its own decision in the *Heye Case* (181 App. Div. 544), which has since been modified by this court, and it is now necessary to follow such modifications here so far as the facts are the same, and make other modifications based on the fact that the trust in this estate was created some seven years before the trust in the *Heye* case.

The court has adopted March 23, 1892, as the date when the trust was set up. This is the date when testator's youngest child attained his majority, at which time the trustees were directed to divide the residuary estate into shares, and is the proper date, although the trust securities were not physically segregated by the trustees until March 16, 1893.

It is also urged that on June 10, 1896, a judgment of the Supreme Court, New York county, was rendered in an action brought by the then executors and trustees of the will of Josiah Macy, Jr., deceased, for instructions in regard to the disposition of certain Standard Oil trust certificates then held by them, and it is contended that this judgment settled the plaintiffs' accounts and construed the will as bearing upon the rights and duties of the trustees in regard to the Standard Oil securities in such manner as to constitute an adjudication binding on the life beneficiary here, that all of the subsidiaries' stocks distributed in 1911-1912 and all subsequent accumulations

thereof by way of stock dividends and rights were capital of this testamentary trust. This contention cannot prevail. No issue arose or was litigated in that case with respect to the rights of the life beneficiary and remaindermen as against each other, which affects the situation here.

The rules stated in the *Heye* case are to be worked out upon the facts of this trust as follows:

1. As was decided in the *Heye* case, all of the stock of the Standard Oil Co. (Nebraska) and 11/25 of the stock of the Standard Oil Co. (California) should be apportioned to capital instead of income. (224 N. Y. 257-259.)

It is urged that the proofs in this case show that the shares in question, or part thereof, were paid for out of accumulated earnings and should go to the life tenant, but the evidence in the two cases does not differ essentially. It is not enough to show that payment was made out of accumulated earnings. It must appear, in order to sustain the contention of the life tenant, that payment was made out of earnings accumulated subsequent to the formation of the trust. As was said in the *Heye* case, this transaction was but an exchange of stock.

2. The trustees take the position that the court below should have awarded to the life beneficiary 2000/16875 of 84 shares of the Galena Signal Oil Co. preferred stock received by the Ladd trustees in 1911. This stock was awarded to capital in the *Heye* case, but it was bought by the Standard Oil Co. out of the accumulated earnings and is practically conceded to the life beneficiary.

3. The trust was set up in the *Heye* case on May 10, 1899. In the present case the date was March 23, 1892. The Appellate Division for this reason awarded the Continental Oil Co. stock, 939 shares, purchased August 22, 1893, the Swan & Finch Co. stock, 250 shares, purchased July 23, 1894, and the Vacuum Oil Co. stock, 1 share, purchased July 11, 1896, to the life beneficiary, because the purchase in each case was made from accumulated earnings. While it appears that the shares were paid for out of accumulated earnings, it does not appear

when such earnings were accumulated. The Borne-Scrymser stock, purchased March 30, 1893, one year after the formation of the trust, was properly assigned to capital, because the time of the purchase was so soon after the formation of the trust as to indicate that the earnings were accumulated prior to such formation. The same rule should be applied here and the shares assigned to capital.

4. S. W. Penna. Pipe Line Co., Washington Oil Co. and Crescent Pipe Line Co. belong to corpus as in the *Heye* case, and were properly awarded thereto in this case. The trustees see substantial ground for the contention that they should go to the life tenant, but the prior holding on the same facts is controlling here.

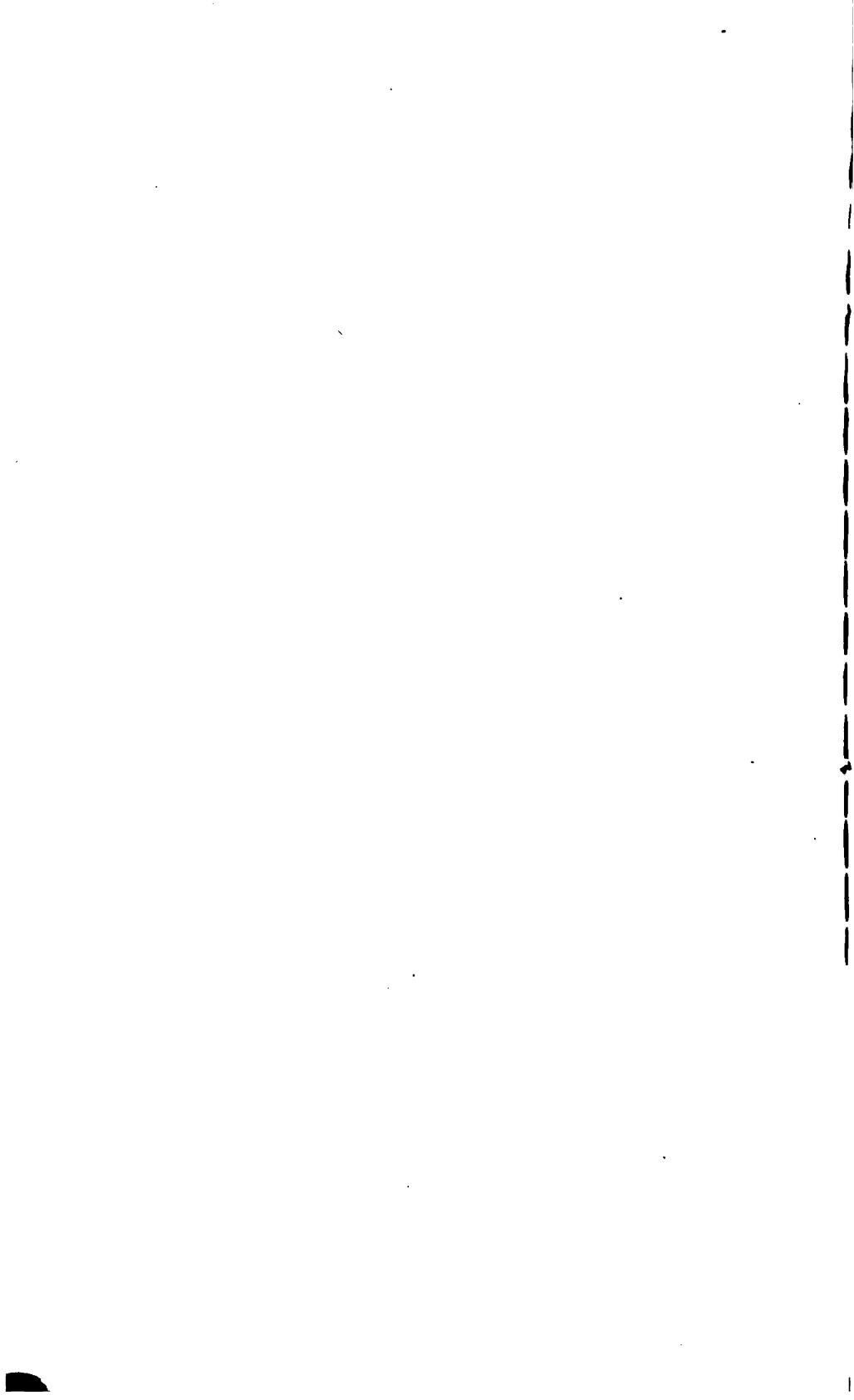
5. Cumberland Pipe Line Co. and Prairie Oil and Gas Co. were awarded to capital in the *Heye Case* (224 N. Y. 257) and this case. No evidence is found that these shares were paid for out of accumulated earnings. It follows that when they were distributed the capital of the company holding them was reduced.

6. Illinois Pipe Line Co. and Prairie Pipe Line Co. stock, assigned to income in the *Heye* case, do not appear in this case.

The judgment of the Appellate Division should be modified as follows: Eleven twenty-fifths (11/25) of the stock of the Standard Oil Co. (California) apportioned to capital; fourteen twenty-fifths (14/25) to the life beneficiary; also to the life beneficiary 2000/16875 of the 84 shares of Galena Signal Oil Co. stock, received by the Ladd trustees in 1911; all of the stock of the Standard Oil Co. (Nebraska), Continental Oil Co., Swan & Finch Co. and Vacuum Oil Co. stock apportioned to capital. In other respects the judgment affirmed, without costs to either party.

HISCOCK, Ch. J., CHASE, CARDOZO, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ., concur.

Judgment accordingly.



In Memoriam

PROCEEDINGS IN THE COURT OF APPEALS

In Reference to the Death of

HON. WILLIAM H. CUDDEBACK,

late one of the Associate Judges of the Court.

On the 29th day of September, 1919, at the opening of the court, Judge Pound read the following:

Judge Cuddeback died at Goshen, New York, on the 16th day of August, 1919, and was buried in the Goshen Cemetery on the 19th day of August, 1919. He was born at Deer Park, Orange county, New York, on the 5th day of March, 1852, of Norman French and Dutch ancestry. Educated at Cornell University and admitted to the bar in 1877, he removed to Buffalo in 1885 and there began a long career of professional and public distinction. He was appointed by Governor Flower and reappointed by Governor Morton as a member of the Board of Managers of the Craig Colony for Epileptics at Sonyea, New York. He served as Corporation Counsel in the years 1897-1901 with notable success. Later he was the nominee of the Democratic and Independence League parties for Justice of the Supreme Court in the Eighth Judicial District. In 1912 he was elected an Associate Judge of the Court of Appeals.

Judge Cuddeback was a trained lawyer of judicial temperament. Politically and consistently a Democrat, he had, like Church and Grover, occupied an honored place among the party chieftains, but no shadow of partisanship fell upon the clear record of his judicial life. In his place he was every inch the judge—quiet and attentive in hearing; deliberate and thoughtful in consultation; wise and impartial in decision.

While he recognized the necessity of adjusting legal principles to the changing experiences of life, he departed reluctantly from established rules. His judgment was not easily blown about by gusts of popular fancy, yet his spirit was progressive and his knowledge of public needs practical.

His opinions, although comparatively few and brief, are worthy of their place in the reports. In them direct and simple thought finds plain and calm expression without the use of superfluous words. Free alike from the adornments of rhetoric and the display of research which at times illumine the prosaic pages of judicial decisions, his style indicates the unconvoluted working of his mind.

The burden of judicial labor, laid upon him late in life, proved too heavy for his frail constitution and to it was soon added the load of ill-health, under which he uncomplainingly struggled for some years before his death. Confinement in court and consultation rooms did not tend to restore his strength, but he took no rest which was not enforced. Relaxation and recreation found small place in his simple habits of life. His associates observed with pain how the tired body and brain contended on uneven terms with nature, until the end came at the conclusion of the year's work.

Judge Cuddeback's disposition was cheerful and friendly. His intimacies were few, but he was staunch and loyal. Those who lived day by day in close touch with him never heard him utter an unkind word nor make a sharp retort. He was not disposed to dogmatize, nor did pride of opinion affect his final judgment.

In sorrow for his death; in recognition of his judicial services; in testimony of his manly patience under affliction, the Court orders this memorial to be placed upon its records.

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ABSTRACT QUESTION.

See People ex rel. Safford v. Washburn (Mem.), 585.

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Agreement between two firms of architects to design and supervise construction of buildings for a railroad company, a certain member of one of the firms to be executive head — contract with railroad company in pursuance of such agreement — cancellation of contract by railroad company upon death of executive head of associated architects — right of surviving partners of deceased executive head to accounting and division of commissions earned under contract with railroad company.

See PARTNERSHIP, 2.

AGRICULTURAL LAW.

Construction and application of section 55 — A creamery association organized under the Business Corporations Law not a "producer" within meaning of statute. A creamery association organized under the Business Corporations Law (Cons. Laws, ch. 4), the largest part of the business of which consists of buying milk and cream for sale, is not a "producer" of milk or cream within the meaning of section 55 of the Agricultural Law (Cons. Laws, ch. 1). Hence the commissioner of agriculture was not authorized to take and enforce for the benefit of such an association the bond which is required by section 55 of that act, having the condition that a licensee thereunder to sell milk or cream shall pay all amounts due to those who have sold milk or cream to him. The language means "producers" who have sold to the licensee, and those only. *Wilson v. Israel.* 423

ALIMONY.

Action by persons, claiming to be entitled to property of a husband now deceased, to annul his marriage to the defendant on ground that he was a lunatic and incapable of entering into a marriage contract — plaintiffs in such action not required to pay alimony and counsel fee to defendant.

See HUSBAND AND WIFE, 2.

ANNULMENT.

Alimony — action by persons, claiming to be entitled to property of a husband now deceased, to annul his marriage to the defendant on ground that he was a lunatic and incapable of entering into a marriage contract — plaintiffs in such action not required to pay alimony and counsel fee to defendant.

See HUSBAND AND WIFE, 2.

APPEAL.

1. When reversal by Appellate Division "upon the facts" must be presumed to have been made upon the law. Where the Appellate Division reversed a judgment entered upon findings made at Trial Term "upon the facts" without further specification, it must be conclusively presumed that the reversal was made upon the law in accordance with section 1338 of the Code of Civil Procedure. *Seneca Distributing Co. v. Fulton.* 48

APPEAL — Continued.

2. If terms of policy of insurance are unambiguous its construction is a question of law reviewable by the Court of Appeals. If the terms of a policy of liability insurance are unambiguous, its construction is a question of law for the court, which survives the unanimous decision of the Appellate Division and is subject to review by the Court of Appeals. *Hartigan v. Casualty Co. of America.* 175

3. Unanimous affirmation by Appellate Division of order confirming report of commissioners in proceedings by city of New York, to acquire lands for water supply purposes, not appealable, without permission, to Court of Appeals. The amendment to section 190 of the Code of Civil Procedure (L. 1917, ch. 290) now regulates the practice on all appeals from judgments or orders and in effect supersedes and repeals special provisions of statutes permitting appeals in particular cases. Section 22 of chapter 724 of the Laws of 1905, which provides that, in a proceeding by the city of New York to acquire land for its additional water supply, an appeal may be taken, must, therefore, be deemed repealed in so far as it permits an appeal to the Court of Appeals, without permission, from an unanimous affirmation of an order finally determining such a proceeding. *Matter of Brigham v. City of New York* (Mem.). 575

4. When judgment entered upon order of reversal insufficient — Case remitted to Supreme Court for perfection of judgment — Not reviewable by Court of Appeals on appeal from order alone. When the Appellate Division in reversing a judgment makes new findings of fact and conclusions of law and by its order provides for equitable relief and costs and directs that judgment be entered accordingly, the entry of a judgment which merely recites the reversal of the judgment and adjudges recovery of costs is insufficient, and the Court of Appeals, upon appeal therefrom, will remit the case to the Supreme Court for perfection of the judgment. The decision of the Appellate Division is not reviewable by an appeal from the order made thereat alone, but must be from the judgment entered upon the order of reversal. *Hermann v. Ludwig* (Mem.). 632

See Earle v. Earle (Mem.), 578; *Matter of People v. U. S. Grand Lodge* (Mem.), 578; *Northern W. L. Co. v. Village of Ossining* (Mem.), 579; *Abt v. Klugman* (Mem.), 580; *Feinstein v. Massachusetts B. & Ins. Co.* (Mem.), 580; *Tri-Bullion S. & D. Co. v. Corliss* (Mem.), 581; *Fort v. Globe & Rutgers Fire Ins. Co.* (Mem.), 581; *Cary v. Town of Scipio* (Mem.), 582; *Zunino v. Parodi Cigar Co.* (Mem.), 582; *Alberti v. Heineman* (Mem.), 583; *Cohen v. N. Y., O. & W. Ry. Co.* (Mem.), 584; *Lawler v. Sheffield Construction Co.* (Mem.), 588; *People v. Trinca* (Mem.), 592; *People v. Saul* (Mem.), 601; *Matter of Fischer* (Mem.), 617; *Campbell v. Tunnicliff* (Mem.), 623; *Dyer v. Silkman* (Mem.), 624; *Rottenberg v. Englander* (Mem.), 626; *People v. Scher* (Mem.), 631; *Laberheim v. Ehrel* (Mem.), 646; *Johnson v. Westchester Street R. R. Co.* (Mem.), 653.

When Court of Appeals not precluded from reviewing unanimous decision of Appellate Division.

See COURTS, 2.

When new trial should be ordered.

See NEGLIGENCE, 6.

When error for Appellate Division to reverse on ground of contributory negligence — when defense of assumption of risk is not available on appeal.

See NEGLIGENCE, 10, 11.

APPELLATE DIVISION.

When reversal by Appellate Division "upon the facts" presumed to have been made upon the law.

See APPEAL, 1.

When error for Appellate Division to reverse on ground of contributory negligence.

See NEGLIGENCE, 10.

ARBITRATION.

See Matter of Wheat Export Co. (Mem.), 595.

ASSAULT.

When owner of apartment house not liable for injuries to child thrown off of sidewalk by janitor of the apartment house to prevent her from roller skating on sidewalk.

See MASTER AND SERVANT, 1.

ASSUMED NAME.

See People v. Scher (Mem.), 631.

ATTORNEY AND CLIENT.

1. *An agreement by an administrator to pay an attorney a certain percentage of the recovery for the death of the administrator's child is only binding on his share thereof.* The father of an infant child, who has been appointed an administrator to bring an action for damages for the death of the child, may bind his own interest in the recovery by an agreement to pay attorneys a specified contingent fee, but he cannot, without the consent of the child's mother, who is entitled to one-half of the recovery (Code Civ. Pro. § 1905), bind her interest therein as to the amount of such fee. The lien upon the mother's share of the recovery must be restricted to a reasonable amount fixed by the court. (Code Civ. Pro. § 1903.) It is unimportant that the father fixed the terms of the retainer before his appointment as administrator. By prosecuting the action after appointment, he approved and continued the arrangement. The attorneys have a lien upon his share for one-half of the contingent fee agreed upon by him. *Matter of Reisfeld.* 137

2. *Contingent fee — Contract between attorney and client valid in absence of fraud — Such contract, however, between attorney and executor for prosecuting action for death subject to review by court.* A contingent fee contract made between client and attorney on retaining the latter is, in the absence of legal fraud, valid. But when the contract is between the executor or administrator under section 1902 of the Code of Civil Procedure and an attorney, for the purpose of prosecuting or maintaining an action under the section, the law imposes the additional condition that as to the damages received, or as to the beneficiaries, the contract is subject to the power of the court to determine the reasonable or suitable compensation or expenditure to the attorney which may be deducted from the recovery. The contract, as a matter of law, through implication, includes that rule of law. *Matter of Meng.* 264

3. *Judgment — Set-off — Lien of attorney upon judgment in his client's favor — Such judgment cannot be set off against another except subject to the lien of the attorney.* Under the statute (Judiciary Law [Cons. Laws, ch. 30], § 475) an attorney has a lien upon his client's cause of action which attaches to a judgment in his client's favor "and the proceeds thereof in whosoever hands they may come," and where judgment debtors have purchased a judgment against their judgment creditor and seek, in an action in equity, to have the judgment assigned to them set off against the judgment which they

ATTORNEY AND CLIENT — *Continued.*
 owe, such set-off cannot be allowed except subject to the lien of the attorneys of the party who obtained the judgment against them.
Beecher v. Vogt Mansg. Co. 468

ATTORNEYS.

What constitutes an attorney-at-law — illegal practice of law.
See CRIMES, 1-3.

When drawing of bill of sale and chattel mortgage by corporation does not constitute practice of law in violation of statute.

See CRIMES, 4.

AUTOMOBILES.

Chauffeur, hired and paid by garage company to operate automobile rented by company for a fixed period at a fixed rental for the use of the lessee, not the servant of the lessee.

See NEGLIGENCE, 8.

When master not liable for injuries to person riding in automobile with chauffeur without knowledge or permission of owner — when such person, whether riding by invitation or by permission of chauffeur, not licensee of owner for whose safety he was responsible — erroneous instructions to jury.

See NEGLIGENCE, 16.

BANKRUPTCY.

See Milkman v. Casesa (Mem.), 615.

Building contract — provision that if contractor abandoned work before completion, building material on property could be used by owner in completion of work and as part payment of contractor's obligation — when upon contractor's failure to complete work, owner took possession of materials, a trustee in bankruptcy for contractors thereafter appointed cannot recover value of such materials.

See CONTRACT, 2.

BANKS AND BANKING.

Forgery — action by drawer of checks to recover from bank, which paid checks on indorsements forged by drawer's agent who afterward indorsed in his own name for his own account — indorsement by agent not guaranty of validity of forged indorsements binding on drawer — failure of drawer, having knowledge of other forgeries of its agent, to notify bank — when effect of such failure question of fact for the jury — erroneous exclusion of evidence.

See BILLS, NOTES AND CHECKS, 4-6.

BASTARDY.

See Coler v. Seidelman (Mem.), 628.

BILLS, NOTES AND CHECKS.

1. Promissory notes — Decedent's estate — Evidence — The words "value received" must give way to evidence that there was no consideration. Where it appeared by the evidence produced for the plaintiff that a decedent made and gave the note in suit as a voluntary gift without consideration, the formula of the printed blank which contained the words "value received" becomes, in the light of the conceded facts, a mere erroneous conclusion which cannot overcome the conclusion of the law. (Neg. Inst. Law, § 54; Cons. L. ch. 38.) *Dougherty v. Sall*. 200

2. When error for trial court in setting aside verdict to dismiss complaint. Where the trial judge did not reserve his ruling on defendant's motion for a nonsuit or for the direction of a verdict, but denied

BILLS, NOTES AND CHECKS — *Continued.*

the motion absolutely, it was error in setting aside a verdict for the plaintiff as contrary to law, to dismiss the complaint. A new trial should have been granted. (Code Civ. Pro. §§ 1185, 1187.) *Id.*

3. *Erroneous exclusion of evidence to show signature to note was forged.* Where in such an action the defendant denied the execution of the note by decedent, it was error for the trial court to exclude evidence offered under a general denial, to show that the signature to the note was forged. *Id.*

4. *Forgery — Action by drawer of checks to recover from bank, which paid checks on indorsements forged by drawer's agent who afterward indorsed in his own name for his own account — Indorsement by agent not guaranty of validity of forged indorsements binding on drawer.* Where plaintiff, a life insurance company, sent its checks drawn on the defendant bank to its general manager and agent for delivery to its policyholders, to whom they were made payable, and the agent forged the names of the payees, deposited the same to his personal account in a bank where he had an account and converted the proceeds thereof to his own use, and the defendant bank has refused to repay to plaintiff the amount of such checks, which were paid by it, the defendant cannot, in an action to recover the amount, avoid its liability on the ground that the plaintiff is precluded from asserting the forgery of the payees' names on such checks because the general manager and agent of the plaintiff by his indorsement of the checks guaranteed the genuineness of the indorsements of the payees, and that the plaintiff is bound thereby. The manager of plaintiff in forging the names of the payees of the checks and his indorsements of the checks following the forged indorsements was acting independently of his agency and in violation of the same, and hence the plaintiff is not responsible therefor. The guaranty of the genuineness of the indorsements of the payees by the manager's subsequent indorsements of such checks was the personal guaranty of the manager and not that of the plaintiff. *Prudential Ins. Co. v. Natl. Bank of Commerce.* 510

5. *Whether failure of drawer to compare indorsements on checks with genuine signatures of payees and failure to notify bank of other forgeries of its agent constituted negligence questions for jury.* Where it appears that, prior to the transactions in question, the plaintiff's general manager and agent had forged signatures to other checks in the same way and that the plaintiff had, or, with reasonable investigation, might have had knowledge thereof; that actual proof of the forgery of one of the checks in question was in plaintiff's possession in time for it to have stopped the payment thereof, and that the manager had confessed and made good to plaintiff part of its losses due to such forged indorsements, it was a question for the jury to determine whether the plaintiff was negligent in failing to examine the indorsements on the checks which had been returned to it by the defendant and other banks with the genuine signature of the payees in its possession prior to the payment of the forged checks in question and whether such negligence and the consequent failure of the plaintiff to notify the defendant of the information that it would have obtained by such examination contributed to the payment of the forged checks by the defendant. It was also a question for the jury herein whether, after plaintiff knew or should have known that its manager had forged the payee's indorsement on another check, which plaintiff thereafter made good to the payee, the plaintiff was negligent in failing to notify the defendant of such facts and the consequent danger of paying other checks, sent by the plaintiff to its manager for delivery to the payees, without special information and knowledge in regard to the genuineness of the payees' indorsements thereon. *Id.*

BILLS, NOTES AND CHECKS — *Continued.*

6. *Erroneous exclusion of evidence.* It was error for the trial court to exclude reasonable evidence tending to show that the amount recovered by the plaintiff from its general manager, after the defendant bank had paid the forged checks in question, included a repayment to it of the amounts in whole or in part charged to the plaintiff by reason of defendant's payment of the forged checks in question, and also whether the defendant was prejudiced by the plaintiff's act in withholding its knowledge of the crimes of its general manager until after his arrest therefor.

Id.

See Lajam v. Sahdala & Son Corp. (Mem.), 667.

BOYCOTT.

Conspiracy — injunction — acts of members of labor unions calculated and intended to destroy plaintiff's good will, trade and business — when such acts may be restrained by injunction.

See LABOR UNIONS.

BROKERS.

When real estate brokers entitled to commissions for procuring loan.

See COMMISSIONS, 1.

BUFFALO (CITY OF).

Mandamus — Patrolman of police force detailed for detective duty, whose designation has been revoked and who has been reassigned to duty as a patrolman, is not entitled to a writ of mandamus reinstating him as detective-sergeant. Under the charter of the city of Buffalo (L. 1891, ch. 105, § 191; amd. by L. 1912, ch. 198) as it existed before the charter enacted in 1914 (L. 1914, ch. 217), the superintendent of police was authorized to detail for detective duty a certain number of patrolmen who should be the detectives of the police force and be known as detective-sergeants with a salary fixed by the police commissioners, and under such provisions patrolmen were detailed to detective duties and were not required to take a new examination nor did they receive from the commissioners a new appointment, and such details might be terminated at the will of the officer who made them, without preferring charges, or a public hearing thereon, since such revocation of a detail was not a reduction of rank within the meaning of other provisions of the charter. The present charter (L. 1914, ch. 217) did not change the status of detective-sergeants previously appointed under the former charter. It follows, therefore, that a patrolman, who had been designated in 1904 to serve as a detective-sergeant, and served until 1919, when his designation was revoked and he was reassigned to duty as a patrolman, is not entitled to a peremptory writ of mandamus reinstating him as a detective-sergeant. *People ex rel. O'Connor v. Girvin.*

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BUSINESS CORPORATIONS LAW.

Agricultural Law — construction and application of section 55 — a creamery association organized under the Business Corporations Law not a "producer" within meaning of statute.

See AGRICULTURAL LAW.

CARRIERS.

See Dobbins v. D., L. & W. R. R. Co. (Mem.), 565; Raymond-Hadley Corp. v. B. & M. Railroad (Mem.), 648.

CHARGE.

Rule for instructions to jury as to value and effect of admissions.

See TRIAL, 2, 3.

CHECKS.

Action to recover from bank amount of checks paid on forged endorsements.

See BILLS, NOTES AND CHECKS, 4-6.

CHILDREN.

Meaning of term "children" in section 1903 of Code of Civil Procedure.

See DECEDEDENT'S ESTATE, 1, 2.

CODE OF CIVIL PROCEDURE.

§ 45 — Terms of court continued for purpose of deciding cases submitted to it.

See COURTS, 1.

§ 190 — Regulates practice on all appeals to Court of Appeals from judgments or orders.

See APPEAL, 3.

§ 264 — Jurisdiction of Court of Claims.

See STATE, 2.

§§ 738-740 — Offer of judgment.

See PARTNERSHIP, 1.

§ 841-b — Burden of proof of contributory negligence on defendant.

See NEGLIGENCE, 10.

§§ 1185-1187 — Erroneous dismissal of complaint — when new trial should be granted.

See BILLS, NOTES AND CHECKS, 3.

§ 1338 — Reversal by Appellate Division presumed to have been made upon the law.

See APPEAL, 1.

§ 1391 — Garnishment of wages.

See SERVICE.

§ 1747 — Action for annulment of marriage.

See HUSBAND AND WIFE, 2.

§ 1822 — Claim against decedent's estate — Statute of Limitations.

See DECEDEDENT'S ESTATE, 3.

§ 1902 — Action for death from negligence.

See ATTORNEY AND CLIENT, 2.

Idem — Action to recover for death.

See MASTER AND SERVANT, 2.

§ 1903 — Attorney's fee in action for death from negligence restricted to reasonable amount fixed by court.

See ATTORNEY AND CLIENT, 1.

Idem — Distribution of recovery in action for negligently causing death — meaning of term "children."

See DECEDEDENT'S ESTATE, 2.

CODE OF CIVIL PROCEDURE — *Continued.*

§ 1905 — Action for negligent killing of child — mother entitled to one-half of recovery.

See ATTORNEY AND CLIENT, 1.

§ 2753 — Commissions of testamentary trustee.

See COMMISSIONS, 2.

COMMISSIONER OF EDUCATION.

Jurisdiction of controversy as to use of state moneys apportioned to New York city.

See SCHOOLS.

COMMISSIONS.

1. *Agreement to pay brokerage fees to procurer of loan on real property and to furnish policy of title insurance — What constitutes failure to furnish policy — When broker entitled to commissions.* Defendant requested plaintiff's assignor to procure for him a loan on certain real property and agreed to furnish a policy of title insurance and pay brokerage fees and other expenses. The assignor procured a competent and willing lender. Defendant procured a preliminary agreement by a title insurance company to insure the title except that the policy proposed left one of the boundary lines of the property indefinite and undetermined. Because thereof the loan was not consummated. *Held*, that the insurance, in form, of the title to a plot of land, a boundary line of which is lacking, is not an insurance of the title, and that the title when so conditioned is not marketable; that defendant failed to perform the obligation on his part entitling him to the loan and that plaintiff is entitled to recover the amount of brokerage fees and expenses as stipulated. *Holman v. Patten.* 22

2. *Testamentary trustees — Commissions of deceased trustee — Surrogate or Supreme Court has discretionary power to award or withhold commissions for services rendered by trustee before his death.* No distinction should be made between the powers of the Supreme Court and those of the surrogate in dealing with the compensation of a testamentary trustee. The surrogate in settling the accounts of trustees of an estate allowed the executors of the will of a deceased trustee compensation for his services up to the time of his death as a co-trustee. A modification by the Appellate Division consisted in increasing the allowance to the full amount of commissions for receiving trust property as fixed by section 2753 of the Code of Civil Procedure. The order states that the estate of the deceased trustee was entitled to this modification as a matter of right and not as a matter of discretion. *Held*, that the surrogate or Supreme Court has discretionary power and may award or withhold commissions in certain cases; and under circumstances such as here existing, may allow such sum as is reasonable for the services of a deceased trustee, not exceeding the statutory percentage. *Matter of Bushe.* 85

See Dugas v. Bashwitz Bros. & Co. (Mem.), 613.

Agreement between two firms of architects to design and supervise construction of buildings for a railroad company, a certain member of one of the firms to be executive head — contract with railroad company in pursuance of such agreement — cancellation of contract by railroad company upon death of executive head of associated architects — right of surviving partners of deceased executive head to accounting and division of commissions earned under contract with railroad company.

See PARTNERSHIP, 2.

COMMITTEE.

When committee of an incompetent not required to pay a claim which the incompetent, if restored to health, would probably not have paid.

See INCOMPETENT PERSONS.

CONDEMNATION PROCEEDINGS.

See Matter of Ramapo Mountains W., P. & S. Co. (Mem.), 609.

Proceeding by city of New York to acquire piers and dock property — rights of owners and lessees under revocable licenses from city — when entitled to damages for loss of business and destruction of buildings erected on piers.

See NEW YORK (CITY OF), 1.

Award in condemnation proceedings instituted to acquire land for municipal purposes — when such award has been duly confirmed by the courts and the award paid as directed therein, a mortgagee who has failed to present and prove her claim thereunder cannot maintain an action against the city to recover the mortgage debt.

See NEW YORK (CITY OF), 3.

CONDITIONAL SALE.

See O'Malley v. Zimbrich (Mem.), 562.

CONSERVATION LAW.

Provision requiring all persons engaged in hunting to have a license — exception as to persons hunting on farmland owned, leased or occupied by them — complaint must allege that defendant did not come within exception.

See FISH AND GAME.

CONSOLIDATED LAWS.

Ch. 1 — Agricultural Law — construction and effect of section 55.

See AGRICULTURAL LAW.

Ch. 4 — Business Corporations Law — creamery associations.

See AGRICULTURAL LAW.

Ch. 16 — Education Law — intent of legislature to repeal portion of New York city charter relating to board of education.

See NEW YORK (CITY OF), 5.

Idem — Education Law — jurisdiction of commissioner of education.

See SCHOOLS, 1.

Ch. 20 — General Business Law — defense of usury cannot be interposed where corporation is principal debtor.

See MORTGAGE, 2.

Ch. 25 — Highway Law — action maintainable against town for damages through defect in highway.

See HIGHWAYS.

Idem — Highway Law — improvement of highways.

See STATE, 6.

Ch. 30 — Judiciary Law — lien of attorney upon judgment in his client's favor.

See ATTORNEY AND CLIENT, 3.

CONSOLIDATED LAWS — *Continued.*

Ch. 31 — Labor Law — provision that no child under sixteen years shall be employed or permitted to operate an elevator.

See NEGLIGENCE, 4.

Idem — Labor Law — provision requiring builders to thoroughly plank over steel and iron beams.

See NEGLIGENCE, 12.

Ch. 38 — Negotiable Instruments Law — words “value received.”

See BILLS, NOTES AND CHECKS, 1.

Ch. 41 — Personal Property Law — suspension of ownership.

See WILL, 4.

Ch. 45 — Public Health Law — practice of medicine.

See CRIMES, 7.

Ch. 48 — Public Service Commissions Law — application for permission to construct a railroad under section 53 of statute.

See RAILROADS, 3.

Ch. 49 — Railroad Law — construction and application of section 178.

See RAILROADS, 2.

Idem — Railroad Law — certificate of public convenience and necessity.

See RAILROADS, 3.

Ch. 50 — Real Property Law — expectant estates.

See WILL, 3.

Ch. 59 — Stock Corporation Law — consent of stockholders to mortgage corporate property.

See CORPORATIONS.

Ch. 65 — Conservation Law — license to hunt.

See FISH AND GAME.

CONSPIRACY.

Boycott — injunction — acts of members of labor unions calculated and intended to destroy plaintiff's good will, trade and business — when such acts may be restrained by injunction.

See LABOR UNIONS, 1, 2.

CONSTITUTIONAL LAW.

Contracts by state — validity of agreement between commissioners of State Reservation at Saratoga Springs giving plaintiff the right to use and possess certain property of the state for specified purposes — refusal of conservation commissioner to carry out such agreement — when plaintiff entitled to injunctive relief from acts of commission — personal liability of commissioner as wrongdoer — unconstitutionality of chapter 204 of Laws of 1917 attempting to confirm acts of commissioner.

See STATE, 3-5.

CONTRACT.

1. *State highways — Contract for construction of highway — Forfeiture of deposit made by bidder — Mandamus — When such bidder cannot recover deposit because of error of estimates of state.* A contractor in a proposal for the construction of a state highway stated that his

CONTRACT — *Continued.*

information of the work to be done and materials to be furnished was "secured by personal investigation and research and not from the estimates of the State Commissioner of Highways." He in fact made his bid based upon such estimates, and, after the bid was accepted, refused to execute the contract upon the ground that his proposal was due to a misunderstanding on his part or a mutual mistake in that the statement in the estimates that certain materials could be obtained at a near-by place at a designated price, was erroneous. Under these circumstances it is not the clear legal duty of the state to relieve the contractor from his obligation and he cannot recover, by mandamus, the certified check which he deposited with the state to become its property if his proposal was accepted and he failed to execute the contract. *Matter of Semper v. Duffey.* 151

2. Bankruptcy — *Provision that if contractor abandoned work before completion, building material on property could be used by owner in completion of work and as part payment of contractor's obligation — When upon contractor's failure to complete work, owner took possession of materials, a trustee in bankruptcy for contractors thereafter appointed cannot recover value of such materials.* A contractor undertook to erect a building for defendant and stipulated that if for any reason he could not perform, and gave up the work, the building material on the property could be used by the owner in carrying out the contract. The contractor entered on the work but, having failed to perform, and abandoned it, the defendant took possession of such material as it found on the work for the purpose of using it in its completion, the cost of which was in excess of the value of the property so taken. Thereafter a petition in involuntary bankruptcy was filed against the contractor, and plaintiff elected trustee in bankruptcy. This action was brought by him to recover the property. *Held*, that the possession taken by the defendant was within the terms of its contract and did not constitute a conversion. Hence, plaintiff cannot recover. *Wilds v. Bd. of Education.* 211

3. Rescission — *Reformation of contract.* While in equity a rescission of a contract may be adjudged on the ground of a unilateral mistake in its contents, in order that a reformation may be adjudged, there must be mutual mistake or inadvertence or the excusable mistake of one party and fraud of the other. There must have been a meeting of the minds of the contracting parties concerning the agreement, or agreement which the court is asked to declare existent. Ignorance through negligence or inexcusable trustfulness will not relieve a party from his contract obligations. He who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents and to assent to them and there can be no evidence for the jury as to his understanding of its terms. *Metzger v. Aetna Ins. Co.* 411

4. Fire insurance — *When builder's risk slip attached to policy limits liability to time building is in course of construction.* An insurance policy, issued June 9, 1916, insured for the term of one year from date a factory building in process of erection. Attached to and a part of the policy when delivered was this slip or rider: "Builders Risk Clause. It is understood and agreed that this policy covers the property described herein only while the building is in process of erection and completion and not as an occupied building." Upon the outside of the folded policy, as delivered, appeared the words, "Expires June 9, 1917." The insured's president, at the delivery, said to the defendant's agent, "This policy is written for a year," and received the reply, "Yes." The building was completed in July, 1916. In October, 1916, it had become equipped with machin-

CONTRACT — *Continued.*

erry. The building was destroyed by fire February 5, 1917. Before that date the agents of the insurer gave notice of cancellation of the policy. In this action brought to recover on the policy the defendant denied liability on the ground it was not an insurer. *Held*, that the facts do not constitute or disclose a liability on the part of the defendant. The two stipulations in the policy were, obviously, to be read together and said the insurance shall exist for one year unless at a time within the year the erection of the building should be completed and its operation entered upon, at which time it shall cease to exist and all the liability under the policy shall cease. *Id.*

5. *When interference with contractual relations malicious.* It is a violation of legal right to interfere with contractual relations recognized by law, if there be no sufficient justification for the interference. Such an act is malicious when the thing is done with the knowledge of the rights of another and with the intent to interfere therewith. In an action to recover damages sustained by reason of a defendant inducing a third party to break his contract, the word "maliciously" should be given a liberal meaning, in which case it does not mean actual malice or ill-will, but consists in the intentional doing of a wrongful act without legal justification. *Lamb v. Cheney & Son.* 418

6. *Action may be maintained against one who maliciously induces plaintiff's employee to break his contract of employment.* When one man employs a laborer, and another man, knowing of such contract of employment, entices, hires or persuades the laborer to leave the service of the first employer during the time for which he was so employed, the law gives to the party injured a right of action to recover damages. *Id.*

7. *When complaint states cause of action.* Where a complaint alleges a specific contract between the employee and the employer for a definite time, allegations of defendant's knowledge thereof, that it "maliciously" induced the employee to break his contract and enter the employment of defendant, and by reason thereof damages were sustained, it states a cause of action. *Id.*

See Young v. U. S. Mortgage & Trust Co. (Mem.), 553; *Onondaga Litholite Co. v. Staub* (Mem.), 555; *Schwarz v. Regensburg & Sons* (Mem.), 568; *Tunney v. Empire State Liquor Co.* (Mem.), 570; *Rosenthal v. Light* (Mem.), 588; *Tyler v. Windels* (Mem.), 589; *People ex rel. Fidelity & Casualty Co. v. Joslin* (Mem.), 598; *Cuppy v. Ward* (Mem.), 603; *Dennin v. Finucane* (Mem.), 604, 605, 606, 607; *Curnen v. Ryan* (Mem.), 626; *Leahy v. Fairlie* (Mem.), 660; *Bankers Service Corp. v. Second Nat. Bank* (Mem.), 662; *Ennis v. Chichester* (Mem.), 663.

An agreement by an administrator to pay an attorney a certain percentage of the recovery for the death of the administrator's child is only binding on his share thereof.

See ATTORNEY AND CLIENT, 1.

Contingent fee — contract between attorney and client valid in absence of fraud — such contract, however, between attorney and executor for prosecuting action for death subject to review by court — distribution of recovery in action under the statute — meaning of term "children" in section 1903 of Code of Civil Procedure.

See ATTORNEY AND CLIENT, 2.

Agreement to pay brokerage fees to procurer of loan on real property and to furnish policy of title insurance — what constitutes failure to furnish policy — when broker entitled to commissions.

See COMMISSIONS, 1.

CONTRACT — *Continued.*

Claim based upon an oral contract or promise of decedent — corroboration of testimony of claimant — when corroboration not required as matter of law.

See DECEDENT'S ESTATE, 4.

Agreement for separation — when courts have not jurisdiction to enforce provision of agreement that if circumstances should change, the amount to be paid by the husband should be decreased.

See HUSBAND AND WIFE.

Partnership as legal entity — where an automobile liability policy insured a firm, as such, and under the firm name, the insurer is not liable for damages for a death caused by the automobile while loaned to another firm of which the members of the insured firm were members.

See INSURANCE, 1.

Insurance (life) — loans on policies — cancellation of policies for failure of insured to pay loans — what constitutes sufficient notice to borrower of intention of company to cancel policies for borrower's default to renew loans or pay interest thereon.

See INSURANCE, 2.

Contract of partnership dissolved by death of one of parties — agreement between two firms of architects to design and supervise construction of buildings for a railroad company, a certain member of one of the firms to be executive head — contract with railroad company in pursuance of such agreement — cancellation of contract by railroad company upon death of executive head of associated architects — right of surviving partners of deceased executive head to accounting and division of commissions earned under contract with railroad company.

See PARTNERSHIP, 2.

Specific performance — what covenants constitute incumbrances upon real property making title unmarketable.

See REAL PROPERTY, 1-4.

Validity of agreement between commissioners of State Reservation at Saratoga Springs giving plaintiff the right to use and possess certain property of the state for specified purposes — refusal of conservation commissioner to carry out such agreement — when plaintiff entitled to injunctive relief from acts of commission — personal liability of commissioner as wrongdoer — unconstitutionality of chapter 204 of Laws of 1917 attempting to confirm acts of commissioner.

See STATE, 3-5.

When agreement to repay loan with a specified bonus dependent upon varying conditions of sale of patented invention is usurious.

See USURY.

CONVERSION.

See Egloff v. Tanger (Mem.), 573; *First Nat. Bank v. Stengel* (Mem.), 659.

CORPORATIONS.

Stock Corporation Law — Consent of stockholders required to make legal and effectual mortgage on corporate property. The purpose of section 6 of the Stock Corporation Law (Cons. Laws, ch. 59) is to

CORPORATIONS — *Continued.*

require the consent of the stockholders as therein provided in every case to make legal and effectual a mortgage on corporate property. This question may be raised by a general assignee of the corporation for the benefit of creditors. *Leffert v. Jackman.* 310

See Krug v. Bliss (Mem.), 566.

Practice of law by corporation in violation of statute — when drawing of bill of sale and chattel mortgage by title guarantee and trust company not a violation of the statute.

See CRIMES, 4.

Railroad Law — Public Service Commissions Law — provision of Railroad Law requiring certificate of public convenience and necessity before construction of railroad — provision of Public Service Commissions Law requiring approval and permission of commission for proposed railroad — construction and application of such provisions.

See RAILROADS, 3.

Franchise tax — net income.

See TAX, 1.

Transfer tax — agreement for re-adjustment of debts of corporation and transfers to and from voting trustees — when one, only, of transfers made for and in pursuance of such agreement subject to the transfer tax.

See TAX, 2.

COSTS.

When offer of judgment insufficient to relieve defendants of costs.

See PARTNERSHIP, 1.

COURT OF APPEALS.

If terms of insurance policy are unambiguous its construction is a question of law reviewable by the Court of Appeals.

See APPEAL, 2.

Unanimous affirmance by Appellate Division of order confirming report of commissioners in proceedings by city of New York to acquire lands for water supply purposes, not appealable, without permission, to Court of Appeals.

See APPEAL, 3.

Case remitted to Supreme Court for perfection of judgment entered upon order of reversal — when not reviewable by Court of Appeals on appeal from order alone.

See APPEAL, 4.

When not precluded from reviewing unanimous decision of Appellate Division.

See COURTS, 2.

COURT OF CLAIMS.

Jurisdiction — liability of state for tort or negligence of its officers and agents — statute conferring upon Court of Claims jurisdiction to hear and determine private claims against the state does not create any liability against the state not otherwise authorized by statute or maintainable in law or equity.

See STATE, 1, 2.

COURT OF CLAIMS — Continued.

Highway Law — unlawful and unauthorized taking of land for highway improvement by contractor before lawful appropriation thereof by state — state not liable therefor — erroneous award by Court of Claims.

See STATE, 6.

COURTS.

1. *Supreme Court — Duration of terms thereof — Extraordinary Special and Trial Terms have same jurisdiction as any other term — When an Extraordinary Term is convened for the disposal of business which may be brought before it, it is deemed to continue until the decision of motions submitted although it has expired for the purpose of new business.* There is no provision of the Constitution or general provision of statute which limits the duration of a term of the Supreme Court when once duly called and convened. When a term of court is ended for new and further business, it may be deemed continued for the purpose of deciding cases and matters finally submitted to it during its regular and formal sittings. (Code Civ. Pro. § 45.) The statement of the purpose of the term in a proclamation convening an Extraordinary Special and Trial Term does not enlarge or diminish the rights of litigants. It becomes a term of the Supreme Court with the same jurisdiction that belongs to any other term. Where by the express direction of the proclamation convening such a term, it was to continue "So long as may be necessary for the disposal of the business which may be brought before it," it should be deemed to continue for the purpose of a final decision of the motions theretofore submitted although it had expired for the purpose of new business. *Saranac L. & T. Co. v. Roberts.* 188

2. *When Court of Appeals not precluded from reviewing unanimous decision of Appellate Division.* A question of law is presented on this appeal, whether upon all the facts as shown in the record about which there is no material controversy, the Extraordinary Special Term in question remained in existence for the purpose of finally disposing of the business before it. Hence this court is not precluded from reviewing the unanimous decision of the Appellate Division. *Id.*

No distinction should be made between powers of the Supreme Court and those of surrogate in dealing with compensation of a testamentary trustee.

See COMMISSIONS, 2.

When courts have no jurisdiction to enforce provision of separation agreement.

See HUSBAND AND WIFE, 1.

CRIMES.

1. *Practice of law.* The practice of law is not limited to the conduct of cases in courts. It embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition conveyancing, the preparation of legal instruments of all kinds, and in general all advice to clients and all action taken for them in matters connected with the law. An attorney-at-law is one who engages in any of these branches of the practice of law. *People v. Alfani.* 334

2. *Violation of statute prohibiting practice of law by one not duly admitted and licensed as attorney.* Under the statute (Penal Law, § 270) it is a misdemeanor for any person to practice as an attorney-at-law or to represent himself as being entitled to practice law, in any manner, without having first been duly and regularly licensed

CRIMES — Continued.

and admitted to practice law in the courts of record of this state; and practicing as an attorney-at-law either in or out of court or holding oneself out as entitled to so practice is the offense. Therefore, to prepare, as a business, legal instruments and contracts by which legal rights are secured and to hold oneself out as entitled to draw and prepare such, as a business, is a violation of the law. *Id.*

3. *Acts constituting violation of statute.* Where defendant, who is not an attorney-at-law, had an office in which he carried on a real estate and insurance business, and also, distinct from such work, drew legal papers, contracts for real estate, deeds, mortgages, bills of sale and wills and displayed in his window a sign bearing the words "Notary Public — Redaction of all legal papers," which defendant explained meant the drawing of legal papers, he was holding himself out to the public as being in the business of drawing papers and legal instruments for hire, and where in pursuance of such business he drew a bill of sale and chattel mortgage for a person and gave advice as to filing the same, for which services he charged and received a fee, defendant was practicing law without a license in violation of section 270 of the statute. *Id.*

4. *Practice of law by corporation in violation of statute — When drawing of bill of sale and chattel mortgage by title guarantee and trust company not a violation of the statute.* A corporation which, on a single occasion without giving any advice leading to and consummated therein, prepares a bill of sale and chattel mortgage by filling out blanks upon and in accordance with the specific direction of a purported customer is not rendering legal services or holding itself out as entitled to practice law. Defendant printed and kept for distribution a booklet of which the cover and each page were entitled, "Fees for the Examination of Titles." There was contained in it the statement, "In all counties, fees for drawing and recording papers and fees for surveys are in addition to the regular charges. Survey charges are found on pages 17-28 and charges for drawing and recording papers on pages 29 and 30." On page 29, which had the additional heading, "Average Charges for Drawing Papers," was found the item, "Bill of Sale (Brooklyn & Queens) \$3.00." Two detectives visited the appellant's place of business. They explained to one of appellant's employees that one of them was selling a store to the other for a given sum and that he desired a bill of sale and chattel mortgage to be drawn. He gave to the employee in response to his request therefor a list of the merchandise which it was claimed was involved. This employee then passed the detectives to another employee who took and filled out in pencil blank forms of a chattel mortgage and bill of sale, which do not appear to have been prepared by the appellant, and gave them to a stenographer to be finally filled out. This stenographer returned them to the last employee who looked them over, placed a seal on them, inquired the rate of interest and stated that the date of execution which was left blank could be filled in when the papers were executed. For thus preparing these papers fees were charged and paid. The corporation has been convicted of a violation of section 280 of the Penal Law prohibiting the practice of law and rendition of legal services by a corporation. *Held*, that the given acts did not constitute practice of law or rendition of legal services and were not such acts as had been committed to the exclusive charge of attorneys but were those which might be performed by a layman at the time these acts were committed without being subject to criminal punishment. *Held, further*, that in the light of all of the evidence derived from this booklet the price advertised for drawing bills of sale is to be regarded as applicable to those which might be lawfully prepared as an incident to its regular business and is not to be regarded as an advertisement holding out the appellant as

CRIMES — *Continued.*

soliciting and engaged in the business of drawing bills of sale in such manner as would amount to the practice of law. *People v. Title Guarantee & Trust Co.* 366

5. *Murder — Killing of proprietor of store which defendant and a companion had attempted to rob — When fatal shot was fired by companion of defendant after they had left the store and were trying to escape, defendant is not guilty of murder in the first degree unless the jury finds deliberation and intent to kill — Whether defendant and his companion were still conspirators and violence used was part of their scheme question for the jury.* Defendant has been convicted of murder in the first degree. He did not himself actually kill decedent; a companion fired the fatal shot to release defendant from the clutches of decedent after they had entered his jewelry store for the purpose of committing robbery or larceny. A passer-by who saw defendant taking a watch and chain out of the show window stepped to the door of the store. Defendant ran out into the street, and his companion, holding up the passer-by with his pistol, also made his escape. As defendant was going along the sidewalk away from the jewelry store and past the adjoining store the proprietor of the jewelry store ran after him and seized him. Thereupon defendant's companion shot and killed the proprietor and both ran away. Both were indicted, but tried separately, and defendant was convicted of murder in the first degree upon the theory that he and his companion were engaged in the commission of robbery when the decedent was shot. There is no evidence that defendant had any stolen property with him at the time of the shooting, or the watch and chain which he was seen to lift from the show window, nor was the value of the watch and chain proved to show that if a larceny was committed or attempted it was a felony and not a misdemeanor. Under this evidence defendant and his companion had completed their felonious act, or had desisted from the attempt to commit it, and were running away, and at the time of the shooting were not engaged in the commission of a robbery. It was, therefore, error for the trial court to submit the case to the jury without instructing them to determine the question of premeditation and deliberation and intent to kill; it was a question of fact for the jury whether or not at the time of the shooting the two men were still conspirators and the violence used within the purpose and object of their combination. *People v. Marwig.* 382

6. *Erroneous charge.* Counsel for the defendant requested the court to charge: "If this evidence does not show that this shooting occurred while the robbery or the attempt at robbery was being made, but was after it was over and abandoned by the persons charged, that they cannot find the defendant guilty as charged in the indictment." The court charged: "Well, the court is perfectly willing to charge that, but with an additional statement: The efforts to escape, if you believe that the evidence satisfies you that a robbery or an attempt to commit a robbery existed, the efforts to escape — and the court is willing to charge it as a matter of law — was all and one a part of a continuous transaction and you cannot divide at a particular point of time when the robbery was complete, in the light of the evidence, as the court understands it, that one of the defendants was jumped upon as he left the store." Held, that the modification made in the additional statement of the court is incorrect and constitutes reversible error. *Id.*

7. *Practicing medicine without being registered and licensed as required by statute (Public Health Law, § 161) — When indictment accusing defendant of committing such crime need not negative exception to such statute.* It is the general rule that in dealing with a statutory crime exceptions must be negatived by the prosecution and provisos utilized as a matter of defense. The two classes of provisions — exceptions

CRIMES — Continued.

and provisos — frequently come closely together and the rule of differentiation ought to be so applied as to comply with the requirements of common sense and reasonable pleading. Where an indictment accused the defendant of the crime of practicing medicine as defined by section 160 of the Public Health Law (Cons. Laws, ch. 45) without being registered and legally authorized so to do, as required by section 161 of the statute, but did not negative the cases enumerated in section 173 of the statute which enacts that the article in which both sections are found shall not be construed to affect a large number of specified persons, the indictment is not defective for that reason, since under the circumstances of this case the provision in question assumes more the nature of a proviso than of an exception. *People v. Devinny.* 397

8. *When indictment defective for failing to name the individual treated by defendant.* Although there are many cases in which an indictment, which charges a statutory crime in the words of the statute, is sufficient, yet where an indictment charges a defendant with the crime of practicing medicine without a license, by diagnosing, treating or offering to diagnose or treat a disease of an individual, it is necessary that the indictment name, or excuse naming by a proper allegation, the individual treated by defendant. *Id.*

DAMAGES.

Tenant at will occupying and working land injured by the abstraction of water from the land for municipal purposes is entitled to the damages caused thereby — damages — when difference in amounts realized from crops before and after the trespass admissible upon the question of usable value.

See LANDLORD AND TENANT, 1-4.

DEBTOR AND CREDITOR.

When agreement to repay loan with a specified bonus dependent upon varying conditions of sale of patented invention is usurious.

See USURY.

DECEDENT'S ESTATE.

1. *Meaning of term "children."* The word "children" is always considered to have been used in its primary sense, and to exclude grandchildren, unless there be something in the document in which it occurs, whether statute, will or contract, which requires a different construction. *Matter of Meng.* 264

2. *Term "children" used in section 1903 of Code of Civil Procedure does not include grandchildren.* Section 1903 of the Code of Civil Procedure has since the amendment of 1911 contained the provisions: "The damages recovered in an action, brought as prescribed in the last section, * * * are exclusively for the benefit of the decedent's husband or wife, and next of kin; and, when they are collected, they must be distributed by the plaintiff, * * * as if they were unbequeathed assets, left in his hands, after payment of all debts, and expenses of administration; subject, however, to the following provisions, to wit: 1. In case the decedent shall have left him surviving a wife or husband, but no children, the damages recovered shall be for the sole benefit of such wife or husband." Held, that the word "children" as used in the section does not include grandchildren and that where a decedent left a widow and grandchildren and no children, the damages recovered in such an action go to the widow and that the amendment of 1911 does not contravene the provisions of section 18, article 1 of the Constitution which interdicts the abrogation of the right of action then existing to prosecute with effect an action to recover damages for injuries resulting in death. *Id.*

DECEDENT'S ESTATE—Continued.

3. Short Statute of Limitations—What must be done to set such statute in operation. To set in operation the short Statute of Limitations (Code Civ. Pro. § 1822) two things are necessary: *First*, the claim must be exhibited to the executor. "Exhibited" as here used means a presentation of the claim to the executor in writing and a demand for its payment. *Second*, notice of rejection must be served upon the claimant. The demand must be clear and decisive. A general conversation from which contrary inferences may be drawn as to whether a demand for immediate payment was or was not intended, or as to whether the executor should have understood that such a demand was made, is not enough. *Diehl v. Becker.* 318

4. Evidence—Claim based upon an oral contract or promise of decedent—Corroboration of testimony of claimant—When corroboration not required as matter of law. In an action upon a claim based upon an oral promise or contract of a decedent, or in support of such a claim disputed by an executor or administrator, the claimant is not required to prove his case by more than a preponderance of evidence. Where the evidence in support of such a claim consists of the testimony of the claimant, such testimony is not required as a matter of law to be corroborated by other evidence in order to make out a gift, although it does call for a very careful scrutiny and examination of the facts, and where a surrogate, after ruling that the testimony of a claimant, upon a claim against a decedent made by the administrator of decedent's estate, although true, required corroboration as matter of law, and for that reason denied the claim, the decision of the Appellate Division affirming the surrogate's decree, although unanimous, must be reversed because based upon insufficient and improper findings. *Matter of Sherman.* 350

5. Trust—Apportionment between life beneficiaries and remaindermen of subsidiary stocks distributed on dissolution of holding corporation, stock of which formed part of trust fund. The judgment in an action brought by trustees under a will for instructions as to the disposition to be made of securities distributed to them by the Standard Oil Company upon its dissolution and in regard to certain stock dividends declared and issued by several of the subsidiaries subsequent to the distribution modified in accordance with the principles laid down in *U. S. Trust Co. of N. Y. v. Heye* (224 N. Y. 242). *Macy v. Ladd* (Mem.). 670

See Bowden v. Owen (Mem.), 612; *Bourne v. Dorney* (Mem.), 641.

Validity of note alleged to have been executed by decedent

See BILLS, NOTES AND CHECKS, 1, 3.

Action by persons claiming to be entitled to property of a husband now deceased to annul his marriage.

See HUSBAND AND WIFE, 2.

When will clearly and explicitly expresses the desires of a testatrix creating a charitable trust the court will not bestow her estate upon next of kin upon a claim that the gift is unreasonable in amount for the purposes of the trust.

See WILL, 1.

Bequest and devise to beneficiary to use such part of principal as she might deem necessary and with power to sell real estate and use proceeds thereof—executors cannot maintain action to recover moneys left at death of testator's widow—right to action accrued to residuary legatees.

See WILL, 2.

DECEDENT'S ESTATE — *Continued.*

Testamentary gift — absolute gift followed by repugnant gift to another — when such absolute gift not modified or qualified by subsequent provision.

See WILL, 3, 4.

DISTRIBUTION.

Distribution of recovery in action for negligently causing death — meaning of term "children" in section 1903 of Code of Civil Procedure.

See DECEDENT'S ESTATE, 1, 2.

EDUCATION LAW.

Board of education of city of New York — division of authority and responsibility, as to public schools, between such board and state department of education — sections 96 and 108 of New York charter not repealed by chapter 786 of Laws of 1917 — power of commissioner of accounts to examine accounts of board of education — when attachment will issue against witness who refused to obey a subpoena under ruling of state commissioner of education advising him so to do.

See NEW YORK (CITY OF), 4-6.

State department of education — school moneys appropriated by state and apportioned to New York city — controversy whether such moneys may be used in reduction of taxes or be placed to credit of board of education — writ of prohibition — state commissioner of education has no authority to decide such controversy — when writ of prohibition should be granted.

See SCHOOLS, 1, 2.

ELECTION OF REMEDIES.

Workmen's Compensation Law of New Jersey — negligence — a servant, a resident of New Jersey, having, as permitted by the New Jersey statute, elected to accept the remedies provided thereby instead of the common-law remedies for injuries, his legal representative cannot maintain a common-law action for the death of such servant from injuries received while working in this state.

See MASTER AND SERVANT, 2.

ELECTIONS.

Queens county — Sheriffs — *The present sheriff of Queens county having been elected for a term to expire January 23, 1920, there will be no vacancy in the office to be filled at the general election in November, 1919.* The sheriff of Queens county was elected at a special election for the term of three years to expire on January 23, 1920; hence there will be no vacancy in that office until that date. When the vacancy occurs the governor may appoint an incumbent to hold office until a sheriff to be elected at the general election in November, 1920, takes the office on January 1, 1921. Therefore, the electors of Queens county cannot lawfully choose a sheriff at the general election in 1919. *People ex rel. Bast v. Voorhis.*

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See Matter of Cotte v. Gilbert (Mem.), 600.

ELEVATORS.

Labor Law — provision that no child under sixteen years shall be employed or permitted to operate an elevator — action to recover for injuries of child injured while running an elevator — contributory negligence of child no defense, under express provision of statute.

See NEGLIGENCE, 3, 4.

ELEVATORS — *Continued.*

Fatal injuries to mechanic working in elevator shaft and struck by elevator descending in adjoining shaft — duty of employer to protect workman in such place — when evidence does not justify finding that decedent was chargeable with contributory negligence — doctrine of assumption of risk not applicable.

See NEGLIGENCE, 9, 11.

EMINENT DOMAIN.

Proceeding by city of New York to acquire piers and dock property — rights of owners and lessees under revocable licenses from city — when entitled to damages for loss of business and destruction of buildings erected on piers.

See NEW YORK (CITY OF), 1.

Award in condemnation proceedings instituted to acquire land for municipal purposes — when such award has been duly confirmed by the courts and the award paid as directed therein, a mortgagee who has failed to present and prove her claim thereunder cannot maintain an action against the city to recover the mortgage debt.

See NEW YORK (CITY OF), 3.

EQUITY.

Rescission of contract — reformation.

See CONTRACT, 3.

Agreement for separation — when courts have not jurisdiction to enforce provision of agreement that if circumstances should change, the amount to be paid by the husband should be decreased.

See HUSBAND AND WIFE, 1.

ESTATES.

Validity of note alleged to have been executed by decedent.

See BILLS, NOTES AND CHECKS, 1, 3.

Distribution of recovery in action for negligently causing death — meaning of term "children" in section 1903 of Code of Civil Procedure.

See DECEDEDENT'S ESTATE, 1, 2.

Claim against decedent's estate — what must be done to set short Statute of Limitations in operation.

See DECEDEDENT'S ESTATE, 3.

Claim based upon an oral contract or promise of decedent — corroboration of testimony of claimant — when corroboration not required as matter of law.

See DECEDEDENT'S ESTATE, 4.

Apportionment between life beneficiaries and remaindermen of subsidiary stocks distributed on dissolution of holding corporation, stock of which formed part of trust fund.

See DECEDEDENT'S ESTATE, 5.

Action by persons claiming to be entitled to property of a husband now deceased to annul his marriage.

See HUSBAND AND WIFE, 2.

ESTATES — *Continued.*

When will clearly and explicitly expresses the desires of a testatrix creating a charitable trust the court will not bestow her estate upon next of kin upon a claim that the gift is unreasonable in amount for the purposes of the trust.

See WILL, 1.

Bequest and devise to beneficiary to use such part of principal as she might deem necessary and with power to sell real estate and use proceeds thereof — executors cannot maintain action to recover moneys left at death of testator's widow — right to action accrued to residuary legatees.

See WILL, 2.

Testamentary gift — absolute gift followed by repugnant gift to another — when such absolute gift not modified or qualified by subsequent provision.

See WILL, 3, 4.

EVIDENCE.

1. *Trial — Witness — Party may not be permitted to impeach his own witness although disreputable and unsatisfactory — Claim of privilege sustained by court does not correct erroneous ruling on admissibility of evidence.* When the refusal of a witness to identify the defendant as the other party to a conversation testified to by the witness is not positive but equivocal and circumstances suggest that the conversation was with defendant, the question as to whom his testimony refers is one of fact for the jury. A party should not be permitted to impeach his own witness. After having unsuccessfully taken a chance to secure favorable testimony, he may not attack the character of such witness and ask the jury to infer the contrary of what has been sworn to, because the falsity of the evidence is to be presumed when the character of the witness is disclosed. When a disreputable witness is called and frankly presented to the jury as such, the party calling him represents him for the occasion and the purposes of the trial as worthy of belief. In the search for truth he may have to press the witness severely. But he must not thereafter, when disappointed in the testimony given, attack the credibility of the witness by asking questions tending solely to show him to be unworthy of belief, and where the only effect of an affirmative answer to a question asked by a party to his own witness for such purpose will be to discredit the witness, the question is objectionable. Error in this respect is not cured by permitting a witness to refuse to answer on the ground that the answer would disgrace him. Such ruling protects the witness but the result is as prejudicial to the rights of the party as an affirmative answer. *People v. Minsky.*

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2. *Presumption of receipt of letter.* Even if a letter properly directed and stamped is properly mailed, the presumption of its receipt is one of fact based upon the circumstances of the particular case. Where there was no proof of a proper address or of proper stamps, the trial court was justified in finding that it was never received. *Diehl v. Becker.*

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Promissory notes — the words "value received" must give way to evidence that there was no consideration — error to exclude evidence offered under general denial that decedent's signature was forged.

See BILLS, NOTES AND CHECKS, 1, 3.

Erroneous exclusion of evidence in action to recover from bank amount of checks paid on forged indorsements.

See BILLS, NOTES AND CHECKS, 6.

EVIDENCE — *Continued.*

Claim based upon an oral contract or promise of decedent — corroboration of testimony of claimant — when corroboration not required as matter of law.

See DECEDENT'S ESTATE, 4.

When testimony as to difference in amounts realized from crops before and after trespass admissible.

See LANDLORD AND TENANT, 4.

When jury could not legitimately have inferred from the evidence facts essential to the verdict, the verdict cannot be sustained.

See NEGLIGENCE, 2.

Probative value and effect of admissions.

See TRIAL, 1.

EXCEPTIONS.

When renewal of exception unnecessary.

See TRIAL, 4.

EXECUTION.

See Botelho v. Siebert (Mem.), 595.

Service of process — wages — personal service must be made upon employer, of execution directed against wages of employee, to make employer liable to the judgment creditor.

See SERVICE.

EXECUTORS AND ADMINISTRATORS.

See Matter of Guy (Mem.), 607.

An agreement by an administrator to pay an attorney a certain percentage of the recovery for the death of the administrator's child is only binding on his share thereof.

See ATTORNEY AND CLIENT, 1.

Contingent fee — contract between attorney and client valid in absence of fraud — such contract, however, between attorney and executor for prosecuting action for death subject to review by court — distribution of recovery in action under the statute — meaning of term "children" in section 1903 of Code of Civil Procedure.

See ATTORNEY AND CLIENT, 1, 2.

Bequest and devise to beneficiary to use such part of principal as she might deem necessary and with power to sell real estate and use proceeds thereof — executors cannot maintain action to recover moneys left at death of testator's widow — right to action accrued to residuary legatees.

See WILL, 2.

FEDERAL STATUTES.

1916, ch. 463; 1917, ch. 63 — Income Tax — net income.

See TAX, 1.

FIRE INSURANCE.

Rescission — reformation of contract — builder's risk — when builder's risk slip attached to fire insurance policy limits liability to time building is in course of construction.

See CONTRACT, 3-4.

FISH AND GAME.

Conservation Law — Provision requiring all persons engaged in hunting to have a license — Exception as to persons hunting on farmland owned, leased or occupied by them — Complaint must allege that defendant did not come within exception. The Conservation Law (Cons. Laws, ch. 65, § 185, subd. 1) requires all persons engaged in hunting to procure a license. By subdivision 8 of the section an exception is made as to persons hunting on farmland owned or leased and occupied by them. In this action to recover a penalty for violation of the statute, the complaint did not negative the fact that defendant was one of the persons within the description in the latter provision. Held, that it was necessary for the People in the complaint to negative the fact that defendant came within the exception, but that the burden will rest on the defendant to prove the existence or non-existence of the facts making the exception. *People v. Bradford.* 45

FORGERY.

Erroneous exclusion of evidence to show signature to note was forged.

See BILLS, NOTES AND CHECKS, 3.

Action by drawer of checks to recover from bank, which paid checks on indorsements forged by drawer's agent who afterward indorsed in his own name for his own account — indorsement by agent not guaranty of validity of forged indorsements binding on drawer — failure of drawer, having knowledge of other forgeries of its agent, to notify bank — when effect of such failure question of fact for the jury — erroneous exclusion of evidence.

See BILLS, NOTES AND CHECKS, 4-6.

FRANCHISE TAX.

See People ex rel. American B. & B. Co. v. Knapp (Mem.), 574; *People ex rel. Iroquois Door Co. v. Knapp* (Mem.), 592.

Tax Law — in arriving at net income of a manufacturing corporation no deduction is to be made on account of excess profits tax paid by the corporation to the United States.

See TAX, 1.

GARNISHMENT.

Service of process — execution — wages — personal service must be made upon employer, of execution directed against wages of employee, to make employer liable to the judgment creditor.

See SERVICE.

GENERAL BUSINESS LAW.

Defense of usury cannot be sustained where corporation is principal debtor.

See MORTGAGE, 2.

GIFT.

See Wood v. Ketcham (Mem.), 641.

GRADE CROSSING PROCEEDINGS.

See City of Corning v. Holmes (Mem.), 624; *City of Corning v. O'Neill* (Mem.), 625.

GUARANTY.

Usury — when mortgage may be kept alive after payment thereof — guarantor of loan to a corporation cannot raise defense of usury — defense of usury in action to foreclose mortgage — when facts do not sustain such defense.

See MORTGAGE, 1-3.

HIGHWAY LAW.

Action against town for flooding of lands through defect in highway maintainable under sections 47 and 75 of Highway Law.

See HIGHWAYS.

Improvement of highways — acquisition of land.

See STATE, 6.

HIGHWAYS.

Liability of town for improper construction of culvert by town superintendent, causing flooding of adjacent land — Sufficiency of complaint. At common law, commissioners of highways of towns were personally responsible for the negligent or wrongful performance of their duty. The right of action against commissioners who act contrary to or omit to act in accordance with their duty is by statute made maintainable against the town. It is not limited to acts or omissions which interfere with travel along the surface of the highway, but includes unlawful discharge of water on the lands of another by defective construction and care of culverts and sluices. Where a complaint in an action against a town alleges in substance that a steel and concrete culvert, over a small dry creek, flowing in times of freshet, was so negligently constructed and maintained across a highway by the defendant's superintendent of highways, in place of an adequate old wooden culvert, that on two occasions when rainstorms occurred it was inadequate to care for the water which flowed down the creek, causing it to back up and overflow upon plaintiff's land, thus damaging her property, such allegations sufficiently charge an unlawful act of the superintendent of highways and constitute a cause of action against the town under the statute (Highway Law [Cons. Laws, ch. 25], §§ 47, 75), since it alleges that the damages sustained were caused by reason of a defect in the culvert, which is a part of the highway, because of the neglect of the town superintendent. (Highway Law, § 74.) *Bowman v. Town of Chenango.* 459

State highways — contract for construction of highway — forfeiture of deposit made by bidder — mandamus — when such bidder cannot recover deposit because of error in estimates of state.

See CONTRACT, 1.

Highway Law — unlawful and unauthorized taking of land for highway improvement by contractor before lawful appropriation thereof by state — state not liable therefor — erroneous award by Court of Claims.

See STATE, 6.

HUNTING.

Conservation Law — provision requiring all persons engaged in hunting to have a license — exception as to persons hunting on farmland owned, leased or occupied by them — complaint must allege that defendant did not come within exception.

See FISH AND GAME.

HUSBAND AND WIFE.

1. *Equity — Agreement for separation — When courts have not jurisdiction to enforce provision of agreement that if circumstances should change, the amount to be paid by the husband should be decreased.* The plaintiff and defendant entered into a separation agreement which contained a provision to the effect that plaintiff should pay to the defendant sums named therein to be used for her support and maintenance and that of their children. In addition to these provisions it contained one which read as follows: "In the event that there should be any material change in the circumstances of either of the parties hereto either party hereto shall have the right to apply

HUSBAND AND WIFE — *Continued.*

to any court of competent jurisdiction for a modification of the provisions herein regarding the amounts to be paid hereunder by the party of the first part (the husband) to the party of the second part hereto (the wife).¹³ After making the payments provided in the agreement for several years plaintiff brought this action wherein he alleged in substance that his income had become greatly impaired and that of his wife considerably increased, that he was no longer able to make the payments in the agreement provided, and that the defendant insisted upon full payment and prayed relief that the amount required by him to be paid under the original terms of the agreement might be reduced and, if the court should determine that it was without jurisdiction to grant this relief, that it might be adjudged that the separation agreement was no longer in force and the defendant be enjoined from prosecuting any action thereunder against the plaintiff. Held, that the court cannot reform an agreement entered into by parties by making a new agreement or provision for them in the place of the one which they have deliberately adopted, and that its equitable powers cannot be invoked for the purpose of restraining enforcement by defendant of this contract unless there be some facts justifying such relief of which a court of equity could and a court of law could not take cognizance and that the presentation of the case shows no such fact. *Stoddard v. Stoddard.*

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2. *Alimony — Action by persons, claiming to be entitled to property of a husband now deceased, to annul his marriage to the defendant on ground that he was a lunatic and incapable of entering into a marriage contract — Plaintiffs in such action not required to pay alimony and counsel fee to defendant.* This action is brought under section 1747 of the Code of Civil Procedure for the purpose of procuring a judgment annulling the marriage of the defendant, whose husband is now deceased, on the ground that at the time the ceremony was performed the latter was incapable of entering into the contract by reason of his then being a lunatic. The plaintiffs are entitled to share in the estate of the father of the deceased husband, in which estate a child of his marriage to defendant is entitled to a distributive share in case the marriage was valid. Held, that while the statute clothes them with authority, as interested parties, to maintain an action to test the validity of the marriage, they are under no obligation to pay alimony or to furnish defendant with means to defend the action. She is not a privileged suitor against them, but only against her husband while he lived. *Farnham v. Farnham.*

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INCOMPETENT PERSONS.

When committee of an incompetent not required to pay a claim which the incompetent, if restored to health, would probably not have paid. In a proceeding to compel the committee of an incompetent to pay the expenses of the petitioner in an action brought against him, it appeared that the petitioner, acting upon his own initiative, took charge of the property of the incompetent and looked after him and his affairs, when his mind became impaired; in so doing the petitioner questioned the validity of a power of attorney given by the incompetent to another, and caused such attorney in fact and another to be indicted for conspiracy. The defendants were acquitted. Thereafter they brought actions against petitioner for malicious prosecution, which actions were compromised and settled by petitioner, who now asks that the expenses of defending the actions and the amount paid by him on the settlement be repaid him out of the estate of the incompetent. The committee of the incompetent was not a party to the actions against petitioner or consulted with reference thereto. Held, that the petition sets forth no facts sufficient to sustain an order requiring the committee of the incompetent to pay any part of the claim. *Matter of Lord.*

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See Matter of Clarkson (Mem.), 599.

INDICTMENT.

Practicing medicine without being registered and licensed as required by statute — when indictment accusing defendant of committing such crime need not negative exception to such statute — when such indictment defective for failing to name the individual treated by defendant.

See CRIMES, 7, 8.

INJUNCTION.

Acts of members of labor unions calculated and intended to destroy plaintiff's good will, trade and business — when such acts may be restrained by injunction.

See LABOR UNIONS, 1, 2.

When plaintiff entitled to injunctive relief against acts of state officer.

See STATE, 4.

INSURANCE.

1. *Partnership as legal entity — Where an automobile liability policy insured a firm, as such, and under the firm name, the insurer is not liable for damages for a death caused by the automobile while loaned to another firm of which the members of the insured firm were members.* An automobile liability policy insured plaintiffs under their firm name and as a firm doing business as a department store merchant at a designated place in a designated city, against "loss and expense by reason of claims made upon the assured" by reason of accidents by any person by reason of "the ownership, maintenance or use" of a delivery automobile described in the policy. The firm so insured consisted of two copartners who with a third person as a partner formed another partnership which conducted a department store in another city. While the automobile was being used temporarily in the business of the latter firm in the last-mentioned city and driven by an employee of that firm, a child was run over and killed. The plaintiffs individually paid two-thirds of the amount for which the claim was settled and brought this action to recover the amount thus paid. The terms of the policy are unambiguous and limit the liability of the insurer to accidents which occurred while the automobile was used in the firm business of the firm named in the policy. Hence the policy cannot be so construed as to bring within its terms the individual liability of the plaintiffs as members of the other partnership for the injury arising out of the accident. The fiction that a partnership is a legal entity is recognized among business men and in construing commercial contracts. *Hartigan v. Casualty Co. of America.*

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2. *(Life) — Loans on policies — Cancellation of policies for failure of insured to pay loans — What constitutes sufficient notice to borrower of intention of company to cancel policies for borrower's default to renew loans or pay interest thereon.* Plaintiff's decedent borrowed money on five life insurance policies as collateral, from the company which had issued them, giving promissory notes therefor, in each stating that he had deposited with and assigned to the company as collateral security one of such policies and agreeing that if he failed to repay the note or interest when due the company "without further notice and without further demand for payment may cancel said policy as of the date of default" and apply to the payment of the note and interest the sum fixed as the surrender value of the policy and pay the balance, if any, on demand to the parties entitled thereto. The borrower failed to pay the notes when due, after they had been renewed on the same terms. The company wrote him before the notes became due and on two subsequent occasions, calling his attention to the matter and requesting payment. No action was taken by the borrower and forty-five

INSURANCE — *Continued.*

days after the notes became due they were canceled as of the date when due. *Held*, that the contract is clear and its terms unambiguous and on default the company might cancel the policies without further notice. Such cancellation became effective without notice to decedent and was not subject to the condition that he should be first paid the balance due him or informed that the company held that sum subject to his demand, nor did the company by its acts waive its right to cancel without further notice. *Stevens v. Mut. L. Ins. Co.*

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See Stahlberg v. Protected Home Circle (Mem.), 555; *Goldstein v. N. Y. Life Ins. Co.* (Mem.), 575.

Liability — when construction of policy reviewable by Court of Appeals.

See APPEAL, 2.

Reformation of contract — fire insurance — builder's risk — when builder's risk slip attached to fire insurance policy limits liability to time building is in course of construction.

See CONTRACT, 3, 4.

JUDGMENT.

Judgment entered upon order of reversal — when case will be remitted to Supreme Court for perfection of judgment.

See APPEAL, 4.

Set-off — lien of attorney upon judgment in his client's favor — such judgment cannot be set off against another except subject to the lien of the attorney.

See ATTORNEY AND CLIENT, 1.

Offer of judgment — when offer of judgment made by one co-partner not in compliance with statute and not binding upon his co-partner.

See PARTNERSHIP, 1.

JUDICIARY LAW.

Lien of attorney upon judgment in his client's favor.

See ATTORNEY AND CLIENT, 3.

JURISDICTION.

When courts have no jurisdiction to enforce provision of separation agreement.

See HUSBAND AND WIFE, 1.

State department of education — school moneys appropriated by state and apportioned to New York city — controversy whether such moneys may be used in reduction of taxes or be placed to credit of board of education — writ of prohibition — state commissioner of education has no authority to decide such controversy — when writ of prohibition should be granted.

See SCHOOLS, 1, 2.

Court of Claims — liability of state for tort or negligence of its officers and agents — statute conferring upon Court of Claims jurisdiction to hear and determine private claims against the state does not create any liability against the state not otherwise authorized by statute or maintainable in law or equity.

See STATE, 1, 2.

LABOR LAW.

See People v. Liggett Co. (Mem), 617.

Provision that no child under sixteen years shall be employed or permitted to operate an elevator — action to recover for injuries of child injured while running an elevator — contributory negligence of child no defense, under express provision of statute.

See NEGLIGENCE, 3, 4.

Provision thereof requiring owners to thoroughly plank over steel and iron beams — when question whether this was done one of fact for a jury, not of law for the court.

See NEGLIGENCE, 12, 13.

LABOR UNIONS.

1. *Personal rights — Contracts for purchase and sale of labor — Right to effectuate desire without interference.* Personal liberty or the right of property embraces the right to make contracts for the purchase of labor of others and equally the right to make contracts for the sale of one's own labor and the employment of one's individual and industrial resources. It is subject, however, to the condition that its exercise in the particular transaction shall not be inconsistent with the public interests or hurtful to the public order or detrimental to the common good. The right of the citizen to effectuate his desire or judgment without interference or compulsion must always be exercised with reasonable regard for the conflicting rights of others. An invasion of this right, without a cause or reason which the law deems essential or useful in the existence or betterment of organized society, is a legal and actionable wrong which may be compensated or restrained. There is an important and perceptible difference, in the realms of justice, civil order and law, between the voluntary acts of an individual, done in the right of personal freedom, the right to do or to refrain from doing, and their injurious effects, and the acts of others, undesired by them, initiated and performed in virtue of the deception, compulsion or oppression on the part of that individual, and their injurious effects.

Auburn Draying Co. v. Wardell.

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2. *When acts of members of labor unions intended to destroy plaintiff's business may be restrained by injunction.* In an action brought by an employer of labor against members of labor unions to recover damages and for a permanent injunction, the trial court made findings which are supported by evidence to the effect that the defendants sought the destruction of plaintiff's business and that their acts were calculated to and intended to destroy the plaintiff's good will, trade and business, and, in part, accomplished that purpose, and that such acts were done in furtherance of a conspiracy from which plaintiff was at the time of the commencement of the suit suffering irreparable loss and damage. *Held*, that the means employed were unjustifiable and unlawful and defendants should be restrained from employing them.

Id.

LANDLORD AND TENANT.

1. *Tenant has exclusive right to control and possession of leased premises.* As between a landlord and his tenant, the latter in the absence of some contractual provision to the contrary has an exclusive right to the control and possession of the leased premises and may defend such particular estate until the same has been legally terminated. *Baumann v. City of New York.*

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2. *Where both landlord and tenant sustain damage from act of third person each may maintain action for redress.* Where both landlord and tenant sustain damages by the wrongful act of a third person, the law

LANDLORD AND TENANT — *Continued.*

recognizes the right of each to maintain a separate action against the wrongdoer to redress his individual injury. *Id.*

3. *Tenant at will of land injured by abstraction of water from subsoil entitled to damages caused thereby.* The lands of a wife were, by her permission, worked by the husband, who received the entire income therefrom, the relation between the wife and husband as to the plot of land owned by the wife being that of landlord and tenant, the husband being a tenant at will. The defendant has maintained two driven well pumping stations near the premises so occupied by the plaintiff. The operation of the well abstracted and withdrew from the property in question and its soil a large part of the natural underground and percolating waters belonging to it, lowered the normal water table thereon from one to five feet, rendered the dry soil unproductive, greatly injured its bearing qualities, and rendered the business of market gardening on the land much less profitable than before the wells were put in operation. *Held,* that the defendant was a continuous trespasser and as such invaded the possessory rights of the plaintiff, and for damage sustained to such usuble value the plaintiff is entitled to redress. *Id.*

4. *When testimony as to difference in amounts realized from crops before and after trespass admissible.* Evidence of the amounts realized from the crops before and after the trespass was proper for consideration upon the question of usable value as bearing upon the question as to whether or not the plaintiff had exercised proper judgment as a reasonable man in the management of the property in view of the changed conditions produced by defendant's trespass. *Id.*

See Trustees of Columbia University v. Rathbone (Mem.), 560.

Bond by tenant and surety to pay all mechanics' liens and claims of builders for improvements on premises occupied by tenant — when complaint in action by landlord to recover penalty of bond does not state facts sufficient to constitute a cause of action.

See PLEADING,

LAW (PRACTICE OF).

What constitutes practice of law — violation of statute prohibiting practice of law by one not duly admitted and licensed as attorney.

See CRIMES, 1-3.

Practice of law by corporation in violation of statute — when drawing of bill of sale and chattel mortgage by title guarantee and trust company not a violation of the statute.

See CRIMES, 4.

LETTERS.

Presumption of receipt of letter one of fact.

See EVIDENCE, 2.

LIABILITY INSURANCE.

Construction of policy — partnership as legal entity — where an automobile liability policy insured a firm, as such, and under the firm name, the insurer is not liable for damages for a death caused by the automobile while loaned to another firm of which the members of the insured firm were members.

See INSURANCE, 1.

LIEN.

Attorney's lien in action to recover for negligent killing of intestate.

See ATTORNEY AND CLIENT, 1.

LIEN — *Continued.*

Contingent fee — contract between attorney and client valid in absence of fraud — such contract, however, between attorney and executor for prosecuting action for death subject to review by court — distribution of recovery in action under the statute — meaning of term "children" in section 1903 of Code of Civil Procedure.

See ATTORNEY AND CLIENT, 2.

Lien of attorney upon judgment in his client's favor — such judgment cannot be set off against another except subject to the lien of the attorney.

See ATTORNEY AND CLIENT, 3.

LIFE INSURANCE.

Loans on policies — cancellation of policies for failure of insured to pay loans — what constitutes sufficient notice to borrower of intention of company to cancel policies for borrower's default to renew loans or pay interest thereon.

See INSURANCE, 2.

LIMITATION OF ACTIONS.

What must be done to set short Statute of Limitations in operation.

See DECEASED'S ESTATE, 3.

LOANS.

When agreement to repay loan with a specified bonus dependent upon varying conditions of sale of patented invention is usurious.

See USURY.

MALICE.

When interference with contractual relation is malicious.

See CONTRACT, 5.

MANDAMUS.

Patrolman of police force detailed for detective duty, whose designation has been revoked and who has been reassigned to duty as a patrolman, is not entitled to a writ of mandamus reinstating him as detective-sergeant.

See BUFFALO (CITY OF).

When bidder for state work not entitled to mandamus directing return of check deposited with bid.

See CONTRACT, 1.

MARRIAGE (ANNULMENT OF).

See French v. French (Mem.), 571.

Action by persons, claiming to be entitled to property of a husband now deceased, to annul his marriage to the defendant on ground that he was a lunatic and incapable of entering into a marriage contract — plaintiffs in such action not required to pay alimony and counsel fee to defendant.

See HUSBAND AND WIFE, 2.

MASTER AND SERVANT.

1. When owner of apartment house not liable for injuries to child thrown off of sidewalk by janitor of the apartment house to prevent her from roller skating on sidewalk. Plaintiff, an infant under fourteen years of age, recovered a judgment against defendant, the owner of an apartment house, for injuries received when the janitor of the apartment house threw, or pushed, her off the sidewalk in front of the

MASTER AND SERVANT — *Continued.*

apartment house where she had been roller skating. There is evidence that the tenants in the house had been annoyed by noise caused by children roller skating on the sidewalk in front of the apartments and had complained to the janitor and his wife with reference thereto, and that the janitor, acting on such complaints, had endeavored to prevent children from roller skating on the sidewalk. *Held*, in the absence of any evidence as to the actual authority conferred upon the janitor by the defendant, that the janitor in assaulting the infant plaintiff was not acting within the actual or apparent scope of his employment, and hence his act is not chargeable to the defendant. *Muller v. Hillenbrand.* 448

2. A servant, a resident of New Jersey, having, as permitted by the New Jersey statute, elected to accept the remedies provided by a workmen's compensation law instead of the common-law remedies for injuries, his legal representative cannot maintain a common-law action for the death of such servant from injuries received while working in this state. Under the Workmen's Compensation Law of New Jersey, if a servant prefers to retain his common-law remedies, he may give notice, within a certain time after his employment, and the remedies will be retained. If he chooses to renounce them in return for the statutory scheme of compensation, his voluntary choice is the source and origin of his right. Where plaintiff's intestate, who, at the time of his death, was a resident of the state of New Jersey and in the employ of the defendant, a New Jersey corporation, had made and entered into the contract of employment in that state, but was at work for the defendant in this state at the time of his death, and had, under the New Jersey statute, giving him the right to accept or reject the statutory scheme of compensation, exercised the option to accept it and contracted accordingly, such contract became binding upon him and like any other valid contract enforceable in the state of New York, unless opposed to its public policy. The right of action to recover for death, which is preserved by constitutional provision in this state (Art. 1, § 18), is the one provided for by section 1902 of the Code of Civil Procedure. That section authorizes the executor or administrator to maintain an action to recover damages for the wrongful killing of his decedent "against a natural person who, or a corporation which, would have been liable to an action in favor of decedent by reason thereof if death had not ensued." The contract of employment made by plaintiff's intestate being one which would bar an action against defendant brought by himself, it is equally true that it bars an action by his personal representative, and the contract of employment being valid in New Jersey prevents the maintenance of an action for the recovery here sought in New York. *Barnhart v. Am. Concrete Steel Co.* 531

Contract of employment — malicious interference therewith — when action can be maintained for maliciously inducing plaintiff's employee to break his contract of employment.

See CONTRACT, 5-7.

When a duty imposed upon a foreman involves the exercise of judgment or discretion and he errs, the employer is not liable for injuries caused by the foreman's error.

See NEGLIGENCE, 1.

Automobiles — chauffeur, hired and paid by garage company to operate automobile rented by company for a fixed period at a fixed rental for the use of the lessee, not the servant of the lessee.

See NEGLIGENCE, 8.

Contributory negligence — fatal injuries to mechanic working in elevator shaft and struck by elevator descending in adjoining shaft —

MASTER AND SERVANT — *Continued.*

duty of employer to protect workman in such place — when evidence does not justify finding that decedent was chargeable with contributory negligence — doctrine of assumption of risk not applicable.

See NEGLIGENCE, 9-11.

Labor Law — provision thereof requiring owners to thoroughly plank over steel and iron beams — when question whether this was done one of fact for a jury, not of law for the court.

See NEGLIGENCE, 12, 13.

When owner of wagon not liable for injuries to boy riding at invitation of driver.

See NEGLIGENCE, 14.

When master not liable for injuries to person riding in automobile with chauffeur without knowledge or permission of owner — when such person, whether riding by invitation or by permission of chauffeur, not licensee of owner for whose safety he was responsible — erroneous instructions to jury.

See NEGLIGENCE, 16.

When railroad company not liable under the Federal Safety Appliance Act for death of employee.

See NEGLIGENCE, 17.

MECHANIC'S LIEN.

See Armstrong v. Witt (Mem.), 563; *Dempsey v. Mount Sinai Hospital* (Mem.), 661.

MEDICINE (PRACTICE OF).

Practicing medicine without being registered and licensed as required by statute — when indictment accusing defendant of committing such crime need not negative exception to such statute — when such indictment defective for failing to name the individual treated by defendant.

See CRIMES, 7, 8.

MILK AND CREAM.

Agricultural Law — construction and application of section 55 — a creamery association organized under the Business Corporations Law not a "producer" within meaning of statute.

See AGRICULTURAL LAW.

MONEY LOANED.

See Jenne v. Franklin's Incorporated (Mem.), 569.

MORTGAGE.

1. *When mortgage may be kept alive after payment thereof.* A mortgage, when paid, may be kept alive for other purposes, when the rights of creditors and third parties have not intervened *Salem v. Myles Realty Co.* 51

2. *Guarantor of loan to corporation cannot interpose defense of usury.* Where a corporation is the primary debtor one who guarantees payment cannot interpose the defense of usury by reason of the express provision of the statute (General Business Law, § 374; Cons. Laws, ch. 25), since he stands in no better position than does the corporation. *Id.*

3. *When facts do not sustain defense of usury in action to foreclose mortgage.* This action was brought to foreclose a mortgage to which

MORTGAGE — *Continued.*

the defense of usury was interposed. On examination of the evidence, held, that there is no basis for the conclusion that the loan was made upon a usurious agreement. *Id.*

See Kempf v. Biers (Mem.), 620; *Equitable Life Assur. Society v. Wilds* (Mem.), 627.

Consent of stockholders required to make legal and effectual mortgage on corporate property.

See CORPORATIONS.

When award in condemnation proceedings has been duly confirmed and paid a mortgagee who has failed to present and prove her claim cannot maintain action against city to recover mortgage debt.

See NEW YORK (CITY OF), 3.

MOTOR VEHICLES.

Chauffeur, hired and paid by garage company to operate automobile rented by company for a fixed period at a fixed rental for the use of the lessee, not the servant of the lessee.

See NEGLIGENCE, 8.

When master not liable for injuries to person riding in automobile with chauffeur without knowledge or permission of owner — when such person, whether riding by invitation or by permission of chauffeur, not licensee of owner for whose safety he was responsible — erroneous instructions to jury.

See NEGLIGENCE, 16.

MUNICIPAL CORPORATIONS.

Patrolman of police force detailed for detective duty, whose designation has been revoked and who has been reassigned to duty as a patrolman, is not entitled to a writ of mandamus reinstating him as detective-sergeant.

See BUFFALO (CITY OF).

Abstraction of water from subsoil by driven wells for municipal purposes — liability to tenant.

See LANDLORD AND TENANT, 3.

Proceedings by city of New York to acquire piers and dock property — rights of owners and lessees under revocable licenses from city — when entitled to damages for loss of business and destruction of buildings erected on piers.

See NEW YORK (CITY OF), 1.

Public schools — salaries of teachers.

See NEW YORK (CITY OF), 2.

Award in condemnation proceedings instituted to acquire land for municipal purposes — when such award has been duly confirmed by the courts and the award paid as directed therein, a mortgagee who has failed to present and prove her claim thereunder cannot maintain an action against the city to recover the mortgage debt.

See NEW YORK (CITY OF), 3.

Board of education of New York — division of authority and responsibility, as to public schools, between such board and state department of education — sections 96 and 108 of New York charter not repealed by chapter 786 of Laws of 1917 — power of commissioner

MUNICIPAL CORPORATIONS — *Continued.*

of accounts to examine accounts of board of education — when attachment will issue against witness who refused to obey a subpoena under ruling of state commissioner of education advising him so to do.

See NEW YORK (CITY OF), 4-6.

MURDER.

See People v. Abbruzzo (Mem.), 554; People v. De Somma (Mem.), 604; People v. Esposito (Mem.), 610; People v. Cassidy (Mem.), 616; People v. Bojanowski (Mem.), 616; People v. Mihiterian (Mem.), 617; People v. Useof (Mem.), 622; People v. Hamby (Mem.), 639; People v. Harrison (Mem.), 647; People v. Milano (Mem.), 650.

Killing of proprietor of store which defendant and a companion had attempted to rob — when fatal shot was fired by companion of defendant after they had left the store and were trying to escape, defendant is not guilty of murder in the first degree unless the jury finds deliberation and intent to kill — whether defendant and his companion were still conspirators and violence used was part of their scheme question for the jury — erroneous charge.

See CRIMES, 5, 6.

NEGLIGENCE.

1. *Master and servant — Statute of Pennsylvania — Negligence — When duty imposed upon a foreman involves the exercise of judgment or discretion and he errs, the employer is not liable for injuries caused by the foreman's error.* Where plaintiff while working as a laborer in defendant's coal mine in the state of Pennsylvania, in which there was in force a statute requiring the foreman of every mine, or his assistant, to examine the places where the employees worked to see if they are safe and if unsafe to make them safe, called the attention of the assistant foreman of the mine, and two miners under whom he worked, to a loose rock in the roof of the mine where he was working, and the assistant foreman after examining the place said it was safe and directed plaintiff to go on with his work, and shortly afterward the rock fell upon plaintiff causing the injuries for which this action is brought, the question, under the decision of the courts of Pennsylvania, whether the rock was secure was one that rested in the judgment of the mine foreman, or his assistant, and if they determined, as a matter of judgment, that it was secure, the defendant is not responsible for that conclusion, even if erroneous, and it was error for the trial court, in an action to recover for injuries sustained by plaintiff brought under the Pennsylvania statute, to deny defendant's motion for a nonsuit. *Iwanaukas v. Phila. & R. Coal & Iron Co.* 34

2. *Evidence — When jury could not legitimately have inferred from the evidence facts essential to the verdict, the verdict cannot be sustained.* Plaintiff was a music teacher, fifty-eight years of age at the time of the accident. She was active on her feet and went about the city. While waiting for a street car, she walked up and down and in and out of a waiting car. A car starter employed by defendant called the approaching car and plaintiff started towards it. The starter came up behind and caught her arm. She says: "He helped me along towards the Fifteenth street car when he called out, 'Look out for the car' and dropped my arm, and I went down," breaking a leg. She adds: "He was a kind of support to me. I depended on him as long as he took hold of me." Upon this evidence, while the jury in an action to recover for injuries sustained by plaintiff may have guessed facts essential to the verdict, it could not legitimately have inferred negligence from the evidence; hence, the judgment for plaintiff cannot be sustained. *Kelly v. Nassau Elec. R. R. Co.* 39

NEGLIGENCE — Continued.

3. *Where statutory prohibition is absolute and unqualified violation is itself a basis of liability without proof of negligence.* Where a statutory prohibition is not a mere regulation or dependent upon some other fact, such as obtaining a certificate of the capacity of an infant, but is absolute and unqualified, its violation is in itself a basis of liability by an employer to a person who is injured as the proximate result of his employment contrary to the provisions thereof; and in a suit upon a cause of action thus given by statute, it is not necessary for the plaintiff to prove negligence on the part of the defendant, because the failure to observe the statute creates a liability *per se*, or, as is otherwise and with less accuracy sometimes said is conclusive evidence of negligence. *Karpeles v. Heine.* 74

4. *Violation of provision of Labor Law that no child under sixteen years shall be employed or permitted to run an elevator — Contributory negligence of child so employed does not relieve employer from liability.* The Labor Law (Cons. Laws, ch. 31, § 93) arbitrarily declares that "No child under the age of sixteen years shall be employed or permitted to have the care, custody or management of or to operate an elevator either for freight or passengers." In the case of an infant employed in violation of the direct and unqualified prohibition of the statute public policy requires that a recovery for injuries received by such a child in the course of his unlawful employment shall not be defeated by the very negligence, lack of care and caution that the statute was designed to prevent and make impossible, by prohibiting the employment of such a child in such a capacity. Hence contributory negligence on the part of the infant does not relieve the employer from liability. Plaintiff, a boy less than fourteen years of age, living in a tenement house having an elevator, was permitted and directed by the superintendent of the building, in the place of the regular operator who was about to leave, to run the elevator to carry a workman to an upper floor where he was going to work. Upon the way back, plaintiff stopped at the second floor and left the elevator for some purpose, leaving the elevator door open. While he was absent the elevator moved upward and when plaintiff returned he walked through the open door, fell down the shaft and received the injuries for which the action is brought. The trial court left to the jury the question of the defendants' negligence, including their negligence arising from the violation of the Labor Law, and also the question whether the plaintiff was guilty of contributory negligence, charging the jury in substance that if the plaintiff was guilty of negligence materially contributing to the injuries received by him, he could not recover against the defendants. *Held*, error; that the plaintiff having been employed or permitted to run an elevator contrary to the express and unqualified prohibition of the statute an action for injuries arising in the course of such employment and as the proximate result thereof cannot be defeated by his contributory negligence. *Id.*

5. *Sudden stopping of street car to avoid running over child — When negligence cannot be predicated thereon.* The sudden stopping of a street car when necessary to avoid running over a child on the track, although resulting in shaking, displacing and jerking the passengers, does not evince a disregard of their safety, and negligence cannot be predicated thereon. *Mintz v. International Ry. Co.* 197

6. *Question of fact — When new trial should be ordered.* In an action to recover for injuries from falling over a cleat nailed to a temporary flooring over a subway, the defendant produced as its only witness an employee who testified to a measurement of the cleat. The plaintiff called an inspector of a street railway company, who, with another witness, testified to his opinion as to the thickness of the cleat. Under these circumstances, this court is unable to accept as a verity the measurements which the defendant's employee testified that he made,

NEGLIGENCE — Continued.

and disregard the contradictory testimony and estimate of the inspector produced by the plaintiff. A question of fact as to the defendant's negligence was presented and a new trial should be ordered. *Hoykendorf v. Bradley Contracting Co.* 204

7. *Injury to a boy who touched trolley wire with a piece of wire — Defendant not liable in absence of any evidence that reasonable precautions had not been taken against injury from trolley wire.* The defendant runs a trolley line which is crossed by a bridge. The plaintiff, a boy of about twelve years of age, while crossing the bridge, in swinging a wire about eight feet long, brought it in contact with defendant's trolley wire which was between four and five feet below the top of the parapet of the bridge, which parapet was eighteen inches wide. By this contact the plaintiff was shocked and burned. *Held*, that there was no evidence that defendant had failed in its duty to adopt reasonable precautions against injury from the wire. Hence a recovery by plaintiff cannot be sustained. *Adams v. Bullock.* 208

8. *Master and servant — Automobiles — Chauffeur, hired and paid by garage company to operate automobile rented by company for a fixed period at a fixed rental for the use of the lessee, not the servant of the lessee.* A servant lent or let by his master to another does not become the servant of the other because the other directs what work is to be done or in what way it is to be done. If the servant remains subject to the general orders of the person who hires and pays him he is still his servant, although specific directions may be given him by the other, from time to time, as to the work to be done. Where a garage company by a written agreement rented an automobile and the services of a chauffeur to defendant for a certain term and for a designated sum, to convey defendant wherever he desired to go, the company to hire and pay the chauffeur, to pay all expenses of the maintenance and operation of the car and to provide insurance protecting the defendant from all liability by reason of accident, such chauffeur was not the servant of defendant nor did the relation of principal and agent exist. The chauffeur was the servant of the company in its undertaking to furnish an automobile for the use of the defendant and to carry out the company's work under the agreement. The defendant had no authority, management or care over the automobile or as to the manner in which it should be driven, and the chauffeur did the company's business in his own way, and the orders given him by defendant merely stated to him the work which the company had arranged to do. It follows, therefore, that defendant is not liable for the death of a pedestrian caused by the negligence of the chauffeur in driving the automobile in which defendant was riding. *McNamara v. Leipzig.* 291

9. *Master and servant — Contributory negligence — Fatal injuries to mechanic working in elevator shaft and struck by elevator descending in adjoining shaft — Duty of employer to protect workman in such place.* Where a mechanic was put in one of nine adjoining elevator shafts to repair the doors thereof, which work required him to stand on the top of the elevator cage, to put the door in front of him in order, with elevators shooting up and down beside him, the employer was charged with the duty of vigilance to keep him safe from harm, and where such workman was struck and killed by the elevator in the adjoining shaft, descending swiftly and without warning, and an action was brought to recover for his death, the question whether the defendant had been negligent was one for the jury. *Nicholson v. Greeley Square Hotel Co.* 345

10. *Error for Appellate Division to reverse on ground of contributory negligence when there is no basis in the evidence for a finding thereof.* Where in such case there is no basis in the evidence for a finding of

NEGLIGENCE — Continued.

contributory negligence, the Appellate Division erred in reversing the judgment for plaintiff "on the ground that decedent was guilty of contributory negligence as matter of law." The burden of proof was on the defendant to show that decedent's own negligence had brought him within the path of the descending car (Code Civ. Pro. § 841-b) and that burden was not sustained. *Id.*

11. When defense of assumption of risk is not available on appeal. The defense of assumption of risk not urged upon the trial is not available for the first time on appeal, since this court is not to presume that the notice of injury was inadequate and if it was adequate it would have made the case subject to the provisions of the Labor Law, in which event assumption of risk would not be a defense. Moreover, there being no mention of such defense either in the brief or in the oral argument of counsel for the defendant, it must be held to have been abandoned. *Id.*

12. Labor Law — Provision thereof requiring owners to thoroughly plank over steel and iron beams. The Labor Law (Cons. Laws, ch. 31, § 20) requires that contractors or owners erecting a building with iron or steel beams "shall thoroughly plank over the entire tier of iron or steel beams and extending not less than six feet beyond such beams on which the structural iron or steel work is being erected." The master does not discharge this duty by throwing the boards down, and then closing them to passage. The duty to lay the planking imports a duty to maintain it free from unreasonable obstruction. *Lyles v. Terry & Tench Co.* 361

13. When question whether beams were thoroughly planked one of fact for jury. An ironworker employed in the construction of a large building, who had to go from one end of a floor to the other, walked over planking laid upon the steel framework of the floor until he came to a pile of steel beams which had been thrown across his path. He climbed over the beams and in so doing was injured. The jury found by their verdict that no planking sufficient to supply a pathway of reasonable safety had been placed on either side of the obstruction. The Appellate Division held that it was a question of fact whether planking had been provided on the east side of the obstruction but that the uncontradicted evidence showed sufficient planking to the west and, thus interpreting the evidence, dismissed the complaint. The testimony of the plaintiff, supported and strengthened by a witness, shows that there was no clear and safe pathway to the west of the obstruction. This was contradicted by a photograph produced by the defendant which shows two planks clear, and two obstructed, but plaintiff's witness testified that these planks were laid by himself after the accident and before the photograph was taken and the verdict of the jury imports a finding that the photograph was false. It follows, therefore, that the question whether the beams were "thoroughly" planked was for the jury and that the decision of the Appellate Division should be reversed. *Id.*

14. Master and servant — Injuries to boy riding on milk wagon at invitation of the driver — When owner of wagon not liable. Where defendant, a corporation engaged in the selling and delivery of milk, had given explicit directions to the driver of a milk wagon not to allow children to ride in his wagon, and a corresponding rule was printed in the route book given to him, and a notice to the same effect posted in the defendant's office, the driver had no right or authority to invite the plaintiff, a boy about eleven years of age, to ride with him, and when he did so he acted outside the scope of his employment, and hence the defendant is not responsible for the injuries to plaintiff caused by the negligence of the driver while plaintiff was riding with him. *Goldberg v. Borden's Condensed Milk Co.* 465

NEGLIGENCE — *Continued.*

15. *Railroads — Injury to person lying upon track — Engineer of moving train bound to use reasonable care, only, to see such person.* Where an object, which afterward turned out to be the plaintiff's intestate, was lying between the tracks of defendant's railroad at a street crossing, as a train was approaching, and was struck by the train, and there is no evidence to show how or why decedent was there, and the engineer of the train testified that, although he was looking out of his front cab window, he did not see decedent and could not have seen him, owing to a curve in the track, unless he had leaned out of the cab window to look, it was error for the trial court to submit to the jury the question whether the engineer ought to have seen the decedent in the exercise of due care. There was no such duty unless he had reason to believe that some person was there and he had basis for such belief unless the object was already visible; the engineer in the exercise of due care was not bound, under the particular circumstances in this case, to lean over and put his head out of the cab window in order to have seen the decedent. *Kretik v. N. Y. Central R. R. Co.* 474

16. *Master and servant — When master not liable for injuries to person riding in automobile with chauffeur without knowledge or permission of owner — When such person, whether riding by invitation or by permission of chauffeur, not licensee of owner for whose safety he was responsible — Erroneous instructions to jury.* Where defendant, who had previously instructed his chauffeur not to permit another person to ride in the car, unless defendant gave express permission to that effect or was himself in the automobile at the time; and thereafter the chauffeur was directed by defendant to go to a village after some building materials, and plaintiff's intestate, a contractor working for defendant, without defendant's knowledge, got into the car, but whether with the permission or against the objection and protest of the chauffeur does not appear, and rode with him to the village and assisted in procuring the materials for which the chauffeur had been sent, and again got in the car to return, and on the way back the car was overturned, the chauffeur killed and plaintiff's intestate injured so that he died shortly thereafter, the plaintiff cannot recover. Where in such case the trial judge submitted the case to the jury with instructions that, if they found that the accident was caused by the negligence of the chauffeur, plaintiff could recover, (a) if the intestate was a licensee, in the car by permission of the chauffeur, the defendant, through his chauffeur, owed him ordinary care not to increase the danger while there riding or to create a new danger, or (b) if the intestate was a trespasser, that is, had forced his way in the car without the permission of the chauffeur, that the chauffeur would not be justified in wantonly or willfully injuring him, and if he did, then they might find the defendant liable. *Held*, error, and that the judgment must be reversed for two reasons: *First*, because there is absolutely no evidence in the record which would justify a finding that the chauffeur wantonly or willfully injured the intestate or caused his death, and the jury should have been so instructed. *Second*, the record does not disclose any evidence that the intestate was in the car at the time of the accident with the consent, permission or knowledge of defendant, and as to him he was not a licensee. If he were in the car with the consent of the chauffeur, then as to him he was a licensee, but not as to the defendant. The chauffeur in permitting him to ride was not acting within the scope of his employment or doing anything to further the defendant's interests. *Rolfe v. Hewitt.* 486

17. *Railroads — When railroad company not liable for death of an employee under the Federal Safety Appliance Act.* Where an employee of a railroad engaged in interstate commerce who was riding on a freight car, which collided with a car having no drawbar or coupler,

NEGLIGENCE — *Continued.*

was fatally crushed between the car upon which he was riding and the defective car, the collision was not the proximate result of the absence of the coupler and drawbar where there was no attempt to couple to the defective car. It was not intended to provide a place of safety between colliding cars, hence the decedent cannot recover under the Federal Safety Appliance Act (Act of Congress, March 2, 1893, ch. 196, as amended). *Lang v. N. Y. Central R. R. Co.* 507

See Grim v. Lehigh Valley Coal Co. (Mem.), 558; *Schonfeld v. McMullen, Snare & Triest* (Mem.), 559; *Bicklemeyer v. Lackawanna Steel Co.* (Mem.), 565; *Vogt v. Champlin* (Mem.), 567; *Markovich v. Buffalo & L. E. Traction Co.* (Mem.), 570; *Johnson v. State* (Mem.), 610; *Rosenfeld v. Smith & Sons* (Mem.), 613; *Herke v. South Buffalo Ry. Co.* (Mem.), 618; *Hall v. International Ry. Co.* (Mem.), 619; *Geyer v. N. Y. Consolidated R. R. Co.* (Mem.), 620; *Jensen v. South Brooklyn Ry. Co.* (Mem.), 622; *Murphy v. Ludlum Steel Co.* (Mem.), 634; *Futoransky v. Nassau El. R. R. Co.* (Mem.), 638; *Fults v. N. Y. Central R. R. Co.* (Mem.), 647; *Ogle v. Rosenthal* (Mem.), 649; *De Maria v. N. Y. C. R. R. Co.* (Mem.), 650; *Cohen v. N. Y., O. & W. Ry. Co.* (Mem.), 651; *Levine v. N. Y. Railways Co.* (Mem.), 652; *Capazzi v. Empire G. & El. Co.* (Mem.), 654; *Ferraro v. Terrence* (Mem.), 655; *Grady v. Lehigh Valley R. R. Co.* (Mem.), 663; *Van Ingen v. Jewish Hospital* (Mem.), 665; *Pierson v. Interborough Rapid Transit Co.* (Mem.), 666.

Workmen's Compensation Law of New Jersey — a servant, a resident of New Jersey, having, as permitted by the New Jersey statute, elected to accept the remedies provided thereby instead of the common-law remedies for injuries, his legal representative cannot maintain a common-law action for the death of such servant from injuries received while working in this state.

See MASTER AND SERVANT, 2.

Street crossings — negligence — action against railroad to recover damages arising from fire so far as they were enhanced by blocking of a street crossing by freight train.

See RAILROADS, 1.

Court of Claims — jurisdiction — liability of state for tort or negligence of its officers and agents — statute conferring upon Court of Claims jurisdiction to hear and determine private claims against the state does not create any liability against the state not otherwise authorized by statute or maintainable in law or equity.

See STATE, 1, 2.

NEGOTIABLE INSTRUMENTS.

Words "value received" must give way to evidence that there was no consideration — erroneous exclusion of evidence to show forgery.

See BILLS, NOTES AND CHECKS, 1, 3.

Forgery — action by drawer of checks to recover from bank, which paid checks on indorsements forged by drawer's agent who afterward indorsed in his own name for his own account — indorsement by agent not guaranty of validity of forged indorsements binding on drawer — failure of drawer, having knowledge of other forgeries of its agent, to notify bank — when effect of such failure question of fact for the jury — erroneous exclusion of evidence.

See BILLS, NOTES AND CHECKS, 4-6.

NEW TRIAL.

When new trial was granted on conditions but was not had because plaintiff appealed from the order which was reversed and judgment reinstated, the surety on undertaking for new trial need not pay reinstated judgment upon defendant's failure to pay the same.

See **UNDERTAKING.**

NEW YORK (CITY OF).

1. *Proceeding by city to acquire piers and dock property — Rights of owners and lessees under revocable licenses from city — When entitled to damages for loss of business and destruction of buildings erected on piers.* The shedding permits issued by the department of docks of the city of New York by virtue of the provisions of chapter 249 of the Laws of 1875 are revocable, especially when containing the condition that they may be revoked in the pleasure of the board. Such a license, although unrevoked, should have been valued by commissioners to assess the damages for the taking of such dock property by the city of New York as a shedded pier under a revocable license, one that could be revoked in accordance with these provisions of the charter, and not valued as a shedded pier under a irrevocable license. The claimant should also be allowed the structural value of a shed on the premises unless this be included in the pier value to be ascertained. A corporation whose bulkhead privileges were condemned had carried on a coal business thereon for over twenty years, using it in connection with property across a street seventy feet wide, which was the only thing separating its upland property from the water, as one going business or enterprise. By the taking of the bulkhead by the city under condemnation proceedings, the business of the company has been destroyed and its property as a going plant greatly decreased in value. *Held*, that the fact that the bulkhead is separated from the other property by the street does not prevent an allowance to the claimant for the loss sustained to the plant as a whole. *Matter of City of New York.* 119

2. *Public schools — Salaries of teachers.* There was issued to plaintiff in 1899 an assistant teacher's license to act as a critic teacher in a training school for teachers in the borough of Brooklyn. She was thereafter duly appointed as a critic teacher in said training school, entered upon and continued to perform her duties up to the time of the commencement of this action. During a period including the year 1912, plaintiff in accordance with the actual duties which she was performing was paid the salary of a model teacher, which salary was that provided for by previous enactments for a "critic" teacher. In 1913 she brought an action based on statutory and schedule provisions (L. 1900, ch. 751) as to the salaries of teachers and demanded judgment for a balance claimed to be due to her under that schedule. In that suit judgment was offered and accepted for practically the amount demanded. In 1902 the board of education adopted a new form of license by which critic teachers were licensed simply and solely as such without any reference to their being assistant teachers. In 1911 said board approved, "subject to the enactment of legislation necessary to put them into effect," new salary schedules covering training schools. The plaintiff complains because commencing with the year 1912 she has been paid under said last schedule as a critic teacher instead of as an assistant teacher. *Held*, that the board of education was not prevented in accordance with all the substantial features and duties of her position from classifying and paying plaintiff as a critic teacher rather than as an assistant one, but that the effect of the former judgment is an adjudication that she is entitled to a recovery of fifty dollars for the year 1913 by reason of the amendment to the charter by chapter 902 of the Laws of 1911. *Sullivan v. Board of Education.* 240

NEW YORK (CITY OF) — Continued.

3. *Award in condemnation proceedings instituted to acquire land for municipal purposes* — When such award has been duly confirmed by the courts and the award paid as directed therein, a mortgagee who has failed to present and prove her claim thereunder cannot maintain an action against the city to recover the mortgage debt. An award payable by a municipality is a sure and certain provision for the payment of compensation for the real estate for which the award is made, and stands in place of the real estate for the purpose of determining in equity the rights of the owners. The real estate acquired in the proceeding instituted for that purpose is obtained entirely free from the claims of all owners including all persons having an interest therein, either legal or equitable. It is provided that all contracts and engagements respecting property taken in the proceeding in which an award is made on behalf of the city of New York to acquire title to land, shall, upon such vesting of title in the city, cease, determine and be absolutely discharged as to the part thereof so taken. (Greater New York Charter, L. 1901, ch. 466, § 996.) The charter also provides that all damages awarded by the commissioners of estimate and assessment shall be paid by the city of New York to the respective persons mentioned or referred to in their report. (§ 1001.) It is further provided that the determination of the court on the final confirmation of the report "shall, unless set aside or reversed on appeal, be final and conclusive, as well upon the city of New York as upon the owners, lessees, persons, and parties interested and entitled unto the lands, tenements, hereditaments and premises mentioned in the said report; and also upon all other persons whomsoever." (§ 986.) As the result of these and other provisions, where all of the requirements of the charter relating to the taking of lands for street purposes were complied with by the city, and a party holding a mortgage on the property condemned never served a notice in writing or otherwise as provided by the charter of any claim by her as the owner of the real estate as in the charter defined and never appeared in the proceeding or asserted any claim therein whatsoever, she wholly defaulted in asserting a claim for damages by reason of taking the property, and in such case the city was authorized to pay the award to the person to whom it was directed to be paid by the order of confirmation and is protected in making such payment as against a claim upon the award made by the mortgagee. *Merriman v. City of New York.*

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4. *Board of education of city — Division of authority and responsibility, as to public schools, between such board and state department of education.* Although public education is a state and not a municipal function, some part of its administration may by the state be committed to a municipality and to a board of education as a department of such municipality, and its administration will thus rest upon a specified and prescribed division of authority and responsibility between such representatives of the state and officers of the state education department representing the state. *Matter of Hirshfield v. Cook.*

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5. *Sections 96 and 108 of charter of city of New York not repealed by chapter 786 of Laws of 1917.* Chapter 786 of the Laws of 1917 (Education Law, art. 33a; Cons. L. chap. 16) did not expressly repeal that part of section 96 of the Greater New York charter which provides that the department of education shall be an administrative department of said city; nor section 108 thereof which provides that the head of the department of education shall be called the board of education. From a consideration of the provisions of the charter that concededly have not been repealed and of the provisions of the act of 1917, some of which are herein mentioned, and of section 1618 of the charter, it cannot be held that it was the unmistakable intention

NEW YORK (CITY OF) — *Continued.*
of the legislature to repeal said sections so far as they relate to the
board of education. *Id.*

6. *Commissioner of accounts of city of New York has power to examine accounts of board of education and compel attendance of witnesses — Attachment will issue against witness who refused to obey.* While the educational affairs in the city of New York are under the general management and control of the board of education, such board is subject to municipal control in matters not strictly educational or pedagogic. The city is given supervisory authority over the amount of expenditures in the city for school purposes, whenever they exceed four and nine-tenths mills on every dollar of the assessed valuation of the real and personal property in the city liable to taxation. The responsibility of determining the amount of money to be spent by the board of education over and above the prescribed amount as stated has been left to the city and not to the education department of the state or its agencies as such, and that duty on the part of the city includes the duty of ascertaining the facts upon which its responsibility should be exercised. One of the ways provided by the charter for eliciting information for use in behalf of the city is an examination to be conducted pursuant to section 119 of the charter, and in so doing the commissioner of accounts, who is charged with that duty (Charter, § 119), has full power to compel the attendance of witnesses; and where the commissioner of accounts issued a subpoena to the auditor of the board of education, requiring him to appear and testify upon an investigation of the accounts of the board of education, and the auditor, under the advice and direction of the state commissioner of education, refused to obey the subpoena, a warrant of attachment should be issued to compel his attendance. *Id.*

Proceedings to acquire land for water supply purposes — unanimous affirmation of order confirming report of commissioner not appealable, without permission, to Court of Appeals.

See APPEAL, 3.

Abstraction of water from sub-soil by driven wells for city purposes — liability to tenant.

See LANDLORD AND TENANT, 3.

State department of education — school moneys appropriated by state and apportioned to New York city — controversy whether such moneys may be used in reduction of taxes or be placed to credit of board of education — writ of prohibition — state commissioner of education has no authority to decide such controversy — when writ of prohibition should be granted.

See SCHOOLS, 1, 2.

NEW YORK CITY CHARTER.

Condemnation proceedings — conclusiveness of award.

See NEW YORK (CITY OF), 3.

Sections 96 and 108 of charter not repealed by chapter 786 of Laws of 1917.

See NEW YORK (CITY OF), 5, 6.

Credit of school moneys to general fund under section 1102 of charter.

See SCHOOLS, 2.

NOTES.

Words "value received" must give way to evidence that there was no consideration — erroneous exclusion of evidence to show forgery.

See BILLS, NOTES AND CHECKS, 1, 3.

NOTICE.

Insurance (life) — loans on policies — cancellation of policies for failure of insured to pay loans — what constitutes sufficient notice to borrower of intention of company to cancel policies for borrower's default to renew loans or pay interest thereon.

See INSURANCE, 2.

OFFICERS.

The present sheriff of Queens county having been elected for a term to expire January 23, 1920, there will be no vacancy in the office to be filled at the general election in November, 1919.

See ELECTIONS.

Validity of agreement between commissioners of State Reservation at Saratoga Springs giving plaintiff the right to use and possess certain property of the state for specified purposes — refusal of conservation commissioner to carry out such agreement — when plaintiff entitled to injunctive relief from acts of commission — personal liability of commissioner as wrongdoer — unconstitutionality of chapter 204 of Laws of 1917 attempting to confirm acts of commissioner.

See STATE, 3.

PARTIES.

See Holmes v. Camp (Mem.), 635.

PARTITION.

See Wehrum v. Wehrum (Mem.), 611; Lowe v. Leary (Mem.), 629; Fisher v. Fisher (Mem.), 667.

PARTNERSHIP.

1. *Offer of judgment — When offer of judgment made by one co-partner not in compliance with statute (Code Civ. Pro. §§ 738-740) and not binding upon his co-partner.* No presumption of authority arises from a partnership, which permits third persons to hold the firm liable on offers of judgment subscribed by one of the members of the firm in his own name. Not only must one partner assuming to act for his co-partners in this regard actually be their agent, but the authority expressed or implied must be exercised in the form specified. (Code Civ. Pro. § 740.) Where in an action against co-partners, one of the members of the firm signed in his individual name an offer to compromise which purported to be made on behalf of the firm, no affidavit being attached thereto to the effect that he was authorized to do so on behalf of the firm, the offer of judgment is not valid and is not sufficient to relieve the defendants from costs although the plaintiff recovered a judgment smaller in amount than the sum stated in the offer to compromise. (Code Civ. Pro. §§ 738-740.) Friedman v. Blauner. 327

2. *Contract of partnership dissolved by death of one of parties — Agreement between two firms of architects to design and supervise construction of buildings for a railroad company, a certain member of one of the firms to be executive head — Contract with railroad company in pursuance of such agreement — Cancellation of contract by railroad company upon death of executive head of associated architects — Right of surviving partners of deceased executive head to accounting and division of commissions earned under contract with railroad company.* A contract of partnership is dissolved by the death of one of the parties,

PARTNERSHIP — *Continued.*

whether entered into for a fixed time or not, and after his death the former partner cannot bind the estate of the decedent by new contracts; and although the partnership be expressly extended to executors, they could not be compelled to carry it on, and would be entitled to a dissolution and an account of the assets, subject to the liabilities of the firm incurred up to the time of dissolution. Two firms of architects, preliminary to a contract with a railroad company for services in designing and constructing a railroad terminal station and buildings connected therewith, entered into an agreement that they would render the services and divide the compensation as firms and not as individuals. They also agreed that a member of the first contracting firm should be the executive head of the work. Subsequent to this agreement and in pursuance thereof said firms of architects entered into a contract with the railroad company for doing the work for which the company agreed to pay certain commissions on the actual final costs of the completed buildings, and in which contract the company reserved the right to terminate the employment at any time. Under this contract the work was carried on until the death of the executive head of the associated architects. After his death and upon solicitation of a member of the second firm of the associated architects, the railroad company terminated the then existing contract and made a contract with the last mentioned firm of architects to complete the architectural work for the railroad company. The plaintiff, who is the surviving member of the firm to which the executive head of the associated architects belonged, seeks in this action to recover from the other firm the proportionate amount that would have been received by his firm if the original contract had been carried out, also to recover for commissions earned by reason of the construction of a hotel built by the railroad company, for which preliminary plans had been prepared, although the work was not assigned until after the death of the executive head of the associated architects. *Held*, that, although the death of the executive head terminated the partnership between the firms, it was the duty of the survivors of the firms to take possession of the assets, perform the contract, extinguish the liabilities and close its business for the interest of all parties concerned, and the representatives of the deceased executive are entitled to share in the profits of all unfinished business though subsequently completed. *Held, further*, that although the preliminary plans for the proposed hotel had been prepared by the associated architects before the termination of the contract by the railroad company a "reasonable expectation" of securing a contract for the construction of the hotel was not an asset of the associated architects and hence the plaintiff is only entitled to an accounting and division of the commissions on the preliminary plans of the hotel.

Stem v. Warren.

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Where automobile liability policy insured a firm, as such, and under the firm name, the insurer is not liable for a death caused by the automobile while loaned to another firm in which the members of the insured firm were partners.

See INSURANCE, 1.

PENAL LAW.

§ 270 — Practice of law by one not duly admitted and licensed as attorney prohibited.

See CRIMES, 2, 3.

§ 280 — Practice of law by corporation prohibited.

See CRIMES, 4.

PERSONAL PROPERTY LAW.

Suspension of ownership.

See WILL, 3.

PERSONAL RIGHTS.

Contracts for purchase and sale of labor — right to effectuate desire without interference.

See LABOR UNIONS, 1.

PLEADING.

Principal and surety — Bond by tenant and surety to pay all mechanics' liens and claims of builders for improvements on premises occupied by tenant — When complaint in action by landlord to recover penalty of bond does not state facts sufficient to constitute a cause of action. The defendants, as principal and surety respectively, executed a bond, one of the conditions of which is that the principal therein would "pay, satisfy and discharge all claims of builders, mechanics, material-men, etc., who shall furnish materials or perform work" in making certain changes upon the property of plaintiff's assignor. The complaint alleges failure to comply with this condition, to which the defendants interposed a demurser. There is no allegation in the complaint, nor any allegation from which such facts can be inferred, that plaintiff's assignee has sustained or will sustain any damage whatever by reason of such failure and neglect. Nor are there any allegations to the effect that liens have been or are threatened to be filed by reason of such failure. The omission of such allegations renders the complaint defective. Schwartz & Co. v. Aimwell Co.

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Conservation Law — provision requiring all persons engaged in hunting to have a license — exception as to persons hunting on farm-land owned, leased or occupied by them — complaint must allege that defendant did not come within exception.

See FISH AND GAME.

Sufficiency of complaint in action against town for flooding of land through improper construction of culvert under highway.

See HIGHWAYS.

POLICE.

Patrolman of police force of Buffalo detailed for detective duty, whose designation has been revoked and who has been reassigned to duty as a patrolman, is not entitled to a writ of mandamus reinstating him as detective-sergeant.

See BUFFALO (CITY OF).

PRACTICE.

Supreme Court — duration of terms thereof — extraordinary Special and Trial Terms have same jurisdiction as any other term — when an Extraordinary Term is convened for the disposal of business which may be brought before it, it is deemed to continue until the decision of motions submitted although it has expired for the purpose of new business.

See COURTS, 1.

Offer of judgment — when offer of judgment made by one co-partner not in compliance with statute and not binding upon his co-partner.

See PARTNERSHIP, 1.

PRINCIPAL AND SURETY.

Bond by tenant and surety to pay all mechanics' liens and claims of builders for improvements on premises occupied by tenant — when complaint in action by landlord to recover penalty of bond does not state facts sufficient to constitute a cause of action.

See PLEADING.

When new trial was granted on conditions but was not had because plaintiff appealed from the order which was reversed and judgment reinstated, the surety on undertaking for new trial need not pay reinstated judgment upon defendant's failure to pay the same.

See UNDERTAKING.

PROCESS.

Service of process — execution — wages — personal service must be made upon employer, of execution directed against wages of employee, to make employer liable to the judgment creditor.

See SERVICE.

PROHIBITION (WRIT OF).

Writ of prohibition granted restraining commissioner of education from assuming jurisdiction of a controversy as to use of state moneys apportioned to New York city.

See SCHOOLS, 2.

PUBLIC HEALTH LAW.

Practicing medicine without being registered and licensed as required by statute — when indictment accusing defendant of committing such crime need not negative exception to such statute — when such indictment defective for failing to name the individual treated by defendant.

See CRIMES, 7, 8.

PUBLIC SERVICE COMMISSIONS LAW.

Provision of Railroad Law requiring certificate of public convenience and necessity before construction of railroad — provision of Public Service Commissions Law requiring approval and permission of commission for proposed railroad — construction and application of such provisions.

See RAILROADS, 3.

QUEENS COUNTY.

Sheriffs — the present sheriff of Queens county having been elected for a term to expire January 23, 1920, there will be no vacancy in the office to be filled at the general election in November, 1919.

See ELECTIONS.

RAILROAD LAW.

Construction and application of section 178 requiring street railroad to restore pavement.

See RAILROADS, 2.

Provision of Railroad Law requiring certificate of public convenience and necessity before construction of railroad — provision of Public Service Commissions Law requiring approval and permission of commission for proposed railroad — construction and application of such provisions.

See RAILROADS, 3.

RAILROADS.

1. *Street crossings — Negligence — Action against railroad to recover damages arising from fire so far as they were enhanced by blocking of a street crossing by freight train.* As to travelers upon streets a railway necessarily has the right of way. But an emergency may arise which requires the temporary reversal of this rule. Knowing of such a condition the railway should yield what otherwise would be its rights. It should so manage its trains as not to increase the public hazard. A fair use of its tracks in view of its own interests and those of the public is what it is entitled to. Nothing more. This action is brought to recover damages sustained by plaintiffs as the result of a fire so far as such damages were enhanced by the blocking of the streets of the city of Syracuse by defendant's trains so as to prevent a part of the fire department from reaching the scene of the fire. By reason of the delay, which it is claimed could have been readily avoided by defendant's servants, much greater damage was done by the fire than would have occurred had the fire department been able to reach the fire promptly. The plaintiffs recovered at Trial Term. The judgment entered thereon was reversed by the Appellate Division. On examination of the evidence, held, that the question whether the defendant made reasonable use of its rights in the street in view of the situation, presented a question for the jury. *Globe Malleable I. & S. Co. v. N. Y. C. & H. R. R. Co.* 58

2. *Street railroads — Railroad Law — Construction and application of section 178.* Under the provisions of the Railroad Law (Cons. Laws, ch. 49, § 178) a city which has removed a street pavement in order to make a sewer improvement may require a street railroad, running through the street, to restore the pavement between its tracks and for a space of two feet outside thereof. *City of New York v. Whitridge.* 180

3. *Railroad Law — Public Service Commissions Law — Provision of Railroad Law requiring certificate of public convenience and necessity before construction of railroad — Provision of Public Service Commissions Law requiring approval and permission of commission for proposed railroad — Construction and application of such provisions.* The provision, added to the Railroad Law (Cons. Laws, ch. 49, § 9) in 1892, requires a railroad corporation to secure from the railroad commissioners a certificate of public convenience and necessity before construction. The fundamental purpose of this enactment was not to require the commissioners to pass upon and adopt or reject the precise location of the road as defined by some map, but rather to determine whether public considerations warranted the construction of a road along the route which was generally fixed by specification in the certificate of incorporation of termini, length and counties to be traversed. The object was to permit the railroad commissioners to prevent wasteful competition and public disaster by the construction of roads through localities which already were adequately served rather than to require them to determine the precise line along which roads should run. There is no provision of the Railroad Law, either in section 9 or elsewhere, which requires a railroad company, seeking a certificate of convenience and necessity for a proposed railroad, to file with its application a map indicating with precision and in detail the proposed location of its road; nor is the public service commission, in passing upon the application, limited to a consideration of the particular line defined by such a map or even by other ones filed in the course of the proceedings. Assuming that an application for a certificate of public convenience and for permission to construct a railroad can be made under section 9 of the Railroad Law and section 53 of the Public Service Commissions Law (Cons. Laws, ch. 48) at the same time, and that the commission can pass on the application for permission and approval under section 53 at the same

RAILROADS — *Continued.*

time that it considers the application for a certificate of convenience and necessity, nevertheless, having made a determination that public convenience requires the construction of petitioner's railroad somewhere within the lines of the general route specified in its certificate of incorporation, as might be thereafter fixed under proper proceedings, the commission cannot make an order predicated its permission and approval under section 53 upon the condition that the petitioner shall adopt the exact line of construction specified in the order, which fixed one of the termini of the proposed railroad two thousand feet distant from the terminus fixed in the articles of incorporation and which change necessitated the intersection of an important branch of an opposing railroad by the route of petitioner's railroad. Where, as in this case, the commission granted the general certificate of convenience and necessity by one part of its order under the provisions of the Railroad Law, but did this with the view and belief that it could then incorporate provisions under section 53 of the Public Service Commissions Law whereby it would fix the exact line of petitioner's road and thereby accomplish what it deemed to be wise and necessary, the two provisions of the order are connected and must be considered together and it must be assumed that, in making this decision in favor of a certificate of public convenience and necessity, the commission was influenced by what it purposed to do in the succeeding provisions limiting the route of petitioner. It follows, therefore, that no part of the order can be allowed to stand, that the order of the Appellate Division should be annulled and the proceedings remitted to the commission to pass upon the question of public convenience and necessity for the railroad in accordance with the rules above stated. *People ex rel. N. Y. C. & H. R. R. Co.* 248
v. Public Service Comm.

See People ex rel. Town of Harmony v. Public Service Comm. (Mem.), 590; *Stanley v. Jay Street Connecting Railroad* (Mem.), 639.

When jury could not legitimately have inferred from the evidence facts essential to the verdict, the verdict cannot be sustained.

See NEGLIGENCE, 2.

Negligence cannot be predicated on sudden stopping of street car to avoid running over child.

See NEGLIGENCE, 5.

Injury to boy who touched trolley wire with a piece of wire — defendant not liable in absence of any evidence that reasonable precautions had not been taken against injury from trolley wire.

See NEGLIGENCE, 7.

Injury to person lying upon track — engineer of moving train bound to use reasonable care, only, to see such person.

See NEGLIGENCE, 15.

When railroad company not liable under Federal Safety Appliance Act for death of an employee.

See NEGLIGENCE, 17.

REAL PROPERTY.

1. When court will not compel specific performance of contract to purchase. The court should not compel the specific performance of a contract to purchase real property when the purchaser would be subject to an action at law for damages if restrictive covenants constituting incumbrances on the title should be violated. *Bull v. Burton.* 101

REAL PROPERTY — *Continued.*

2. When covenants in deed prohibiting use of certain materials in erection of building and prohibiting use of property for specified purposes do not render title unmarketable. A covenant in a deed by which the purchaser and his representatives, heirs and assigns, are prohibited from using specified materials in erecting a building or buildings on the real property conveyed, and also prohibiting the use of the property for specified purposes, does not make the title to such property unmarketable if the purchaser, his representatives, heirs and assigns, cannot use such materials in the erection of a building thereon or the property for the purposes mentioned because of some general statute or other law which is equally prohibitive, where the possibility of a change in the statutes or ordinances so as to permit the use of such building materials as are fairly comprehended within such enumeration is upon the facts disclosed too remote for practical consideration. *Id.*

3. When covenant relating to party wall does not constitute incumbrance. Where it appears, upon an examination of the covenants relating to party walls in an agreement between the owners of adjoining lots in a city, that the covenants are confined to the wall in construction at the time the covenant was made — there being no express covenant relating to rebuilding or repairing such wall and the right to extend the wall being confined to an extension of the wall then in course of construction — such covenant does not create an incumbrance, especially where, as appears from the record herein, the parties have entirely and effectually abandoned the right of extending the party wall being erected at the time the agreement was executed, each party having built an independent wall upon his own lot. *Id.*

4. Agreement not to erect stable a restrictive covenant which constitutes an incumbrance. Where there were three adjoining lots, the northerly lot being owned by one person and the southerly lot owned by another and the middle one owned by them as tenants in common, and the owners thereof entered into an agreement in writing, for themselves, their respective heirs and assigns, that they would not erect or use or permit to be erected or used upon any of the three lots any stable either public or private, such agreement creates a restrictive covenant which interferes with a right existing in the owners of the lots and constitutes an incumbrance. *Id.*

See Liebert v. Reiss (Mem.), 557; *Riegel v. Larnard* (Mem.), 562; *Tallman v. Wyand* (Mem.), 572.

Action for flooding of land through improper construction of culvert under highway.

See HIGHWAYS.

A tenant at will occupying and working land injured by the abstraction of water from the land for municipal purposes is entitled to the damages caused thereby — damages — evidence — when difference in amounts realized from crops before and after the trespass admissible upon the question of usable value.

See LANDLORD AND TENANT, 1-4.

Proceeding by city to acquire piers and dock property — rights of owners and lessees under revocable licenses from city.

See NEW YORK (CITY OF), 1.

When award in condemnation proceedings has been duly confirmed and paid a mortgagee who has failed to present and prove her claim cannot maintain action against city to recover mortgage debt.

See NEW YORK (CITY OF), 3.

REAL PROPERTY — *Continued.*

Highway Law — unlawful and unauthorized taking of land for highway improvement by contractor before lawful appropriation thereof by state — state not liable therefor — erroneous award by Court of Claims.

See STATE, 6.

REAL PROPERTY LAW.

Expectant estates.

See WILL, 3.

BRESCISSION.

Reformation of contract — fire insurance — builder's risk — when builder's risk slip attached to fire insurance policy limits liability to time building is in course of construction.

See CONTRACT, 3, 4.

RIPARIAN RIGHTS.

See Dexter Pulp & Paper Co. v. Jefferson Power Co. (Mem.), 556; Columbia Distilling Co. v. State (Mem.), 636.

SALE.

See Hatch v. Village of Monticello (Mem.), 644.

SCHOOLS.

1. *Jurisdiction of commissioner of education.* The commissioner of education, by virtue of section 890 of the Education Law (Cons. Laws, ch. 16), has the power of deciding controversies arising from the action or failure of action of bodies or individuals generally, or, for the time being, made agencies of the education department which are subject to the undisputed authority of the Education Law and bound to obey its commands. The subdivisions of section 890 enumerate bodies and officials recognizing the binding effect of the Education Law, standing as agents under and of it but differing in respect of its meaning and application or refusing to abide by it. The legislature has thus conferred upon the commissioner broad but limited powers to enforce the Education Law. *People ex rel. Hylan v. Finegan.* 219

2. *Commissioner of education has no jurisdiction of a controversy as to whether state money, apportioned to New York city, may be used in reduction of taxes or placed to credit of board of education — When writ of prohibition granted.* The appellants are seeking to restrain by writ of prohibition the commissioner from entertaining jurisdiction and making determination of a controversy which has arisen between the municipal authorities of the city of New York and the board of education of that city concerning the disposition of school moneys appropriated to that city by the state. It is the claim in behalf of the city that under section 1102 of its charter these moneys may be credited to the "general fund for the reduction of taxes" as a reimbursement in part for moneys raised by taxation for school purposes. The board of education claims that said charter provision was impliedly repealed by chapter 786 of the Laws of 1917, and that such moneys should be by the municipal authorities placed to its credit. A proceeding was instituted by the commissioner of education for the purpose of making a quasi-judicial and final determination of this question. The city does not admit that it stands in the position of an agency of the education department nor that the provisions of the Education Law are applicable to the moneys which have been paid over to it, but denies these propositions and insists that under the statutes which constitute its charter it is entitled to hold the moneys which have been paid to it and apply them for the benefit of its tax-payers. Thus its claim is in hostility to the Education Law. *Held,*

SCHOOLS — *Continued.*

that the claim by the commissioner of the right to entertain jurisdiction of, and decide, such a controversy cannot be sustained, and that a writ of prohibition should be granted. *Id.*

Salaries of teachers.

See NEW YORK (CITY OF), 2.

Board of education of city of New York — division of authority and responsibility, as to public schools, between such board and state department of education — sections 96 and 108 of New York charter not repealed by chapter 786 of Laws of 1917 — power of commissioner of accounts to examine accounts of board of education — when attachment will issue against witness who refused to obey a subpoena under ruling of state commissioner of education advising him so to do.

See NEW YORK (CITY OF), 4-6.

SEPARATION.

Agreement for separation — when courts have not jurisdiction to enforce provision of agreement that if circumstances should change, the amount to be paid by the husband should be decreased.

See HUSBAND AND WIFE, 1.

SERVICE.

Execution — Wages — Personal service must be made upon employer, of execution directed against wages of employee, to make employer liable to the judgment creditor. An execution directed against the wages or salary of a judgment debtor upon presentation to the employer becomes a lien to the amount specified upon the wages or salary of the employee as they become due. The employer must then pay the prescribed amount, and if he fails to do so he becomes liable to the judgment creditor. (Code Civ. Pro. § 1391.) Personal service of the execution is clearly contemplated. In this action against the employer, conflicting evidence was given upon this point on behalf of the respective parties, upon which a question of fact arose which the jury was entitled to pass upon. Hence it was error to dismiss the complaint. *Starke v. Beckwith Special Agency.* 42

SESSION LAWS.

1875, Ch. 249 — Department of docks — shedding permits.

See NEW YORK (CITY OF), 1.

1891, Ch. 105 — Buffalo charter — police — detail to detective duty.

See BUFFALO (CITY OF).

1900, Ch. 751 — Salaries of teachers.

See NEW YORK (CITY OF), 2.

1901, Ch. 466 — New York city charter — condemnation proceedings.

See NEW YORK (CITY OF), 3.

Idem — New York city charter — sections 96 and 108 not repealed by chapter 786 of Laws of 1917.

See NEW YORK (CITY OF), 5, 6.

Idem — New York city charter — credit of school moneys to general fund under section 1102 of charter.

See SCHOOLS, 2.

SESSION LAWS — *Continued.*

1905, Ch. 724 — Section 22 repealed in so far as it permits appeal to Court of Appeals, without permission, from unanimous affirmation of order confirming report of commissioners in proceeding by city of New York to acquire lands for water supply purposes.

See APPEAL, 2.

1909, Ch. 9 — Agricultural Law — construction and effect of section 55.

See AGRICULTURAL LAW.

1909, Ch. 12 — Business Corporations Law — creamery associations.

See AGRICULTURAL LAW.

1909, Ch. 22 — Education Law — jurisdiction of commissioner of education.

See SCHOOLS, 1.

1909, Ch. 25 — General Business Law — defense of usury cannot be interposed when corporation is principal debtor.

See MORTGAGE, 2.

1909, Ch. 30 — Highway Law — action maintainable against town for damages arising from defect in highway.

See HIGHWAYS.

Idem — Highway Law — improvement of highways.

See STATE, 6.

1909, Ch. 35 — Judiciary Law — lien of attorney upon judgment in his client's favor.

See ATTORNEY AND CLIENT, 3.

1909, Ch. 36 — Labor Law — provision that no child under sixteen years shall be employed or permitted to operate an elevator.

See NEGLIGENCE, 4.

Idem — Labor Law — provision requiring owners to thoroughly plank over steel and iron beams.

See NEGLIGENCE, 12.

1909, Ch. 43 — Negotiable Instruments Law — words "value received."

See BILLS, NOTES AND CHECKS, 1.

1909, Ch. 45 — Personal Property Law — suspension of ownership.

See WILL, 3.

1909, Ch. 49 — Public Health Law — practice of medicine.

See CRIMES, 7.

1909, Ch. 52 — Real Property Law — expectant estates.

See WILL, 3.

1909, Ch. 61 — Stock Corporation Law — consent of stockholders required to mortgage of corporate property.

See CORPORATIONS.

1909, Ch. 569 — Saratoga Springs Reservation — contract for use and sale of waters.

See STATE, 3.

SESSION LAWS — *Continued.*

1910, Ch. 481 — Railroad Law — construction and application of section 178.

See RAILROADS, 2.

Idem — Railroad Law — certificate of public convenience and necessity.

See RAILROADS, 3.

1911, Ch. 394 — Saratoga Springs Reservation — contract for use and sale of waters.

See STATE, 3.

1911, Ch. 647 — Conservation Law — license to hunt.

See FISH AND GAME.

1911, Ch. 902 — Salaries of teachers.

See NEW YORK (CITY OF), 2.

1912, Ch. 198 — Buffalo charter — police — detail to detective duty.

See BUFFALO (CITY OF).

1914, Ch. 217 — Buffalo charter — police.

See BUFFALO (CITY OF).

1917, Ch. 204 — Unconstitutional in so far as it attempts to confirm illegal acts of conservation commissioner.

See STATE, 5.

1917, Ch. 261 — Highway Law — improvement of highways.

See STATE, 6.

1917, Ch. 290 — Practice on appeal to Court of Appeals.

See APPEAL, 3.

1917, Ch. 726 — Tax Law — franchise tax — net income.

See TAX, 1.

1917, Ch. 786 — Education Law — intent of legislature to repeal portions of New York city charter relating to board of education.

See NEW YORK (CITY OF), 5.

Idem — Education Law — moneys raised by taxation for school purposes — disposition.

See SCHOOLS, 2.

1918, Ch. 276 — Tax Law — franchise tax — net income.

See TAX, 1.

SET-OFF.

Lien of attorney upon judgment in his client's favor — such judgment cannot be set off against another except subject to the lien of the attorney.

See ATTORNEY AND CLIENT, 3.

SHERIFFS.

Queens county — the present sheriff of Queens county having been elected for a term to expire January 23, 1920, there will be no vacancy in the office to be filled at the general election in November, 1919.

See ELECTIONS.

SPECIFIC PERFORMANCE.

Contract to purchase real property — what covenants constitute incumbrances making title unmarketable.

See REAL PROPERTY, 1-4.

STATE.

1. *Liability of state for negligence of its officers and agents.* The state is not liable for injuries arising from the negligence of its officers and agents unless such liability has been assumed by constitutional or legislative enactment. Such exemption does not depend upon its immunity from action without its consent, but rests upon grounds of public policy that no obligation arises therefrom. *Smith v. State of N. Y.* 405

2. *Statute conferring upon Court of Claims jurisdiction as to private claims against state does not concede state's liability nor create a cause of action which did not theretofore exist.* The respondent entered the State Reservation at Niagara by a cinder path, from which he undertook to pass to the grass adjoining when he tripped and fell over a wire strung on iron posts twelve or eighteen inches high along the edge of the path, and sustained serious injuries, for which he recovered, before the Court of Claims, a judgment for a substantial amount, on the theory that the wire was negligently placed and maintained by the officers and agents of the state. Section 264 of the Code of Civil Procedure confers upon the Court of Claims jurisdiction to hear and determine a private claim against the state. It provides that in no case shall any liability be implied against the state, and no award shall be made on any claim against the state except upon such legal evidence as would establish liability against an individual or corporation in a court of law or equity. *Held*, that the state does not thereby concede its liability in favor of a claimant or create a cause of action in his favor which did not theretofore exist. It merely gives a remedy to enforce a liability and submits itself to the jurisdiction of the court, subject to its right to interpose any lawful defense. Hence, the claimant cannot recover. *Id.*

3. *Contracts by state — Constitutional law — Validity of agreement between commissioners of State Reservation at Saratoga Springs giving plaintiff the right to use and possess certain property of the state for specified purposes — Refusal of conservation commissioner to carry out such agreement.* In the absence of constitutional restrictions the control by the state of its proprietary estates and institutions is plenary and its agreements, unaffected by deceit, corruption, collusion or illegal unfairness, as the agreements at the bar are, are not justiciable. The agreement entered into between the commissioners of the State Reservation at Saratoga Springs with the Saratoga State Waters Corporation by authority of chapter 569 of the Laws of 1909, as amended by chapter 394 of the Laws of 1911, was duly executed by the contracting parties. There was not in the making of it any deceit, corruption or unfairness, and it was within the statutory authority of the commissioners. None of its provisions inherently infracts the statutes or transcends the statutory authorization to the commissioners, with this exception: The provision that any difference arising between the parties during the operation of the instrument shall be submitted for final and conclusive adjudication to arbitrators is, perhaps, unenforceable. This covenant is not so interwoven with the other agreements of the instrument as to affect its integrity and validity. Hence, the plaintiff is entitled to the possession of the property mentioned in the instrument and the possession of the defendant, the conservation commissioner, who has taken possession of it and excluded plaintiffs therefrom, is wrongful and without legal right. The instrument granted to the plaintiff complete and perfect rights of use and possession as described in it. It was operative and effective

STATE — Continued.

as a grant and vested in the plaintiff an unconditional interest or estate in the land. It was an agreement on the part of the state that the plaintiff should have and retain the real property — an incorporeal hereditament. The rights granted the plaintiff were not revocable by and at the will of the state or its representatives. The state, or the legislature, of course, could not repeal or abrogate the grant of real property made by it. *Saratoga State Waters Corp. v. Pratt.* 429

4. *When plaintiff entitled to injunctive relief from acts of commissioner.* The action in equity for injunctive relief from the possession or an interference by the defendant is the proper remedy. An injunction is the usual remedy invoked by the owner of a legal easement to remove an obstacle to its possession and enjoyment. The fact that there is neither privity of estate nor privity of contract between the owner and the aggressor is immaterial. *Id.*

5. *Personal liability of commissioner — Unconstitutionality of statute attempting to confirm acts of commissioner.* The acts of the defendant in preventing, by his anterior use and possession, the plaintiff entering into the rights and privileges granted it by the instrument were unauthorized and unlawful and constituted the defendant an individual wrongdoer. In them the defendant ceased to be a public officer and became a private wrongdoer and chapter 204 of the Laws of 1917, in so far as it purported or was intended to adopt or confirm those acts, or violate the grant of the state to the plaintiff, destroyed property rights protected by the Constitution and was ineffective and immaterial. *Id.*

6. *Highway Law — Court of Claims — Unlawful and unauthorized taking of land for highway improvement by contractor before lawful appropriation thereof by state — State not liable therefor — Erroneous award by Court of Claims.* The Highway Law (Cons. Laws, ch. 25, § 148, prior to amendment by L. 1917, ch. 261) provided that whenever a state or county highway, proposed to be constructed or improved under such law, should deviate from the line of a highway already existing, the board of supervisors of the county where such highway was located should acquire land for the requisite right of way prior to the actual commencement of the work of construction. Where in a contract made by the state for the construction of a highway the contractor expressly agreed to conform with the provision of the statute, but, before a strip of land required for widening the highway had been acquired by the board of supervisors of the county, or otherwise, entered upon the land and made excavations for widening the highway, he was a trespasser thereon in violation of his contract with the state and the statute which was in substance made a part of the contract. Hence the owner of the land has no claim against the state and the determination of the Court of Claims awarding her damages is erroneous. Evidence that the highway engineer, in charge of the work, had staked out the lines of the highway to be improved in accordance with the plans and had directed the contractor to make excavations in accordance with the stakes set out by him, falls short of a direction to make such excavations before title to the property, on which the excavations were to be made, was acquired, and such evidence is insufficient to support a finding of the Court of Claims that "The work was being done by a contractor for and with the state, in conformity with plans, specifications, direction, control and instructions of the state, and the operations of said contractor herein-after referred to were in conformity therewith and pursuant thereto." *Konner v. State of N. Y.* 478

State highways — contract for construction of highway — forfeiture of deposit made by bidder — mandamus — when such bidder cannot recover deposit because of error in estimates of state.

See CONTRACT, 1.

STOCK CORPORATION LAW.

Consent of stockholders required to mortgaging of corporate property.

See CORPORATIONS.

STOCKS AND STOCKHOLDERS.

See B. & C. El. Const. Co. v. Owen (Mem.), 569.

Consent of stockholders required to make legal and effectual mortgage on corporate property.

See CORPORATIONS.

STOCKHOLDER'S ACTION.

See Atwater v. Elkhorn Valley Coal-Land Co. (Mem.), 611; Godley v. Crandall & Godley Co. (Mem.), 656.

STREETS.

Street crossings — negligence — action against railroad to recover damages arising from fire so far as they were enhanced by blocking of a street crossing by freight train.

See RAILROADS, 1.

Street railroad required to restore pavement between tracks and two feet outside thereof.

See RAILROADS, 2.

SUPREME COURT.

Surrogate or Supreme Court has discretionary power to award or withhold commissions for services rendered by trustee before his death — no distinction should be made between powers of the Supreme Court and those of surrogate in dealing with compensation of a testamentary trustee.

See COMMISSIONS, 2.

Duration of terms thereof — Extraordinary Special and Trial Terms have same jurisdiction as any other term — when an Extraordinary Term is convened for the disposal of business which may be brought before it, it is deemed to continue until the decisions of motions submitted although it has expired for the purpose of new business.

See COURTS, 1.

SURETY BONDS.

See Eastern Steel Co. v. Globe Indemnity Co. (Mem.), 586.

Bond by tenant and surety to pay all mechanics' liens and claims of bidders for improvements on premises occupied by tenant — when complaint in action by landlord to recover penalty of bond does not state facts sufficient to constitute a cause of action.

See PLEADING.

SURROGATE'S COURT.

Surrogate or Supreme Court has discretionary power to award or withhold commissions for services rendered by trustee before his death — no distinction should be made between powers of Supreme Court and those of surrogate in dealing with compensation of a testamentary trustee.

See COMMISSIONS, 2.

TAX.

1. *Tax Law — Franchise tax — In arriving at net income of a manufacturing corporation no deduction is to be made on account of excess profits tax paid by the corporation to the United States. In fixing the*

TAX — Continued.

net income of a manufacturing corporation for the purposes of the state franchise tax, "which income is presumably the same as the income upon which such corporation is required to pay a tax to the United States," no deduction is to be made of any excess profits tax which was included by the company in its return to the Federal government. (Tax Law, art. 9-A; L. 1917, ch. 726; L. 1918, ch. 276.) The term "net income" as used in the Federal statutes does not exclude the excess profits tax, but simply allows its deduction, by those who pay it, from their net income in arriving at the amount upon which their income tax is to be assessed. (Federal Statutes of 1916, ch. 463; Federal Statutes of 1917, ch. 63.) *People ex rel. Barcalo Mfg. Co. v. Knapp.*

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2. Transfer tax — Agreement for re-adjustment of debts of corporation and transfers to and from voting trustees — When one, only, of transfers made for and in pursuance of such agreement subject to the transfer tax. The stock of a railroad company was delivered by the stockholders to voting trustees who delivered to each of the stockholders their certificate entitling him at the expiration of the trust agreement to a retransfer of his shares. Thereafter, and for the purpose of re-adjusting the debts of the company, an agreement was made between certain banks, as "managers," a trust company as "depositary" and the stockholders and bondholders as "depositors." After the re-adjustment was accomplished the voting trust certificates were surrendered to the first named voting trustees who issued new certificates and delivered them to new voting trustees who issued the usual certificates. Held, upon examination of the agreements and the facts that, for the purposes of a transfer tax, there was only a single transfer of the shares of stock and hence only one of the transfers made under the trust agreement is liable to tax under section 270 of the Tax Law. *Hudson & Manhattan R. R. Co. v. State of N. Y.*

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TAX LAW.

Franchise tax — net income.

See TAX, 1.

Transfer tax — transfers of stock under trust agreement — when only one of transfers liable to tax.

See TAX, 2.

TAXPAYER'S ACTION.

See Schieffelin v. Hylan (Mem.), 593.

TEACHERS.

Salaries of teachers in New York city.

See NEW YORK (CITY OF), 2.

TITLE.

See Bd. of Foreign Missions v. Volk (Mem.), 590; *People v. Dedrick* (Mem.), 608.

Contract to purchase real property — what covenants constitute incumbrances making title unmarketable.

See REAL PROPERTY, 1-4.

TOWNS.

Liability of town for improper construction of culvert by town superintendent, causing flooding of adjacent land.

See HIGHWAYS.

TRADE NAMES.

See Romeike v. Romeike & Co. (Mem.), 561.

TRANSFER TAX.

See Travis v. Ann Arbor Co. (Mem.), 640.

Agreement for re-adjustment of debts of corporation and transfers to and from voting trustees — when one, only, of transfers made for and in pursuance of such agreement subject to the transfer tax.

See TAX, 2.

TRESPASS.

See Burmaster v. State (Mem.), 653; Skou v. Town of North Hempstead (Mem.), 664.

Abstraction of water from subsoil by driven wells.

See LANDLORD AND TENANT, 3.

State not liable for unlawful and unauthorized taking of land for highway improvement.

See STATE, 6.

TRIAL.

1. *Evidence — Admissions — Probative value and effect of admissions.* In a civil action, statements made out of court or of judicial proceeding or record, or, as they are denominated, extra-judicial admissions, by a party to the action, adverse to his claim, are evidence against him that the facts they state are true. They have two phases for the jury's consideration; the one, were they made; the other, their effect. In neither phase have they any character or quality peculiar to themselves, or distinguishing them from the other facts in evidence. *Gangi v. Fradus.* 452

2. *Rule for instructions to jury as to value and effect of admissions.* In instructions to the jury concerning such admissions, the trial justice may profitably and without error, as the evidence justifies, bring to the jury's attention and guidance the rules of law that the probative effect and value of an admission depend upon the conditions and circumstances under which it was made, and upon any other circumstances which may affect or tend to explain such admissions, but it is for the jury itself, in the light of reason and with the exercise of caution, to determine whether the admissions were made, and if made, the value thereof. *Id.*

3. *Erroneous to charge that as matter of law evidence of admissions has weak probative value.* Where in the trial of an action based upon the alleged negligence of the defendant, statements or admissions by the infant plaintiff contradictory of the cause of action were introduced in evidence by the defendant, it was error for the trial justice to instruct the jury, in substance, that evidence of admissions against the interest of a party was not equal in weight or value to that given by disinterested witnesses and that, as matter of law, such evidence has weak probative value. *Id.*

4. *Exceptions — When trial justice repeats in substance erroneous charge to which exception has been taken, renewal of exception not required.* Appellate courts are not diligent in seeking a way to deprive a party of the benefit of an exception pointing out error, where it appears that the trial justice was fully apprised of the nature of the objection. Where a trial justice, in an additional charge made in response to an exception to his main charge, repeats in substance or effect the erroneous part to which the exception was taken, a renewal of the exception is not required. *Id.*

TRIAL — *Continued.*

Promissory notes — evidence — the words "value received" must give way to evidence that there was no consideration — erroneous direction of nonsuit — error to exclude evidence offered under general denial that decedent's signature was forged.

See BILLS, NOTES AND CHECKS, 1, 3.

Question for jury — erroneous exclusion of evidence.

See BILLS, NOTES AND CHECKS, 5, 6.

Murder — killing of proprietor of store which defendant and a companion had attempted to rob — when fatal shot was fired by companion of defendant after they had left the store and were trying to escape, defendant is not guilty of murder in the first degree unless the jury finds deliberation and intent to kill — whether defendant and his companion were still conspirators and violence used was part of their scheme question for the jury — erroneous charge.

See CRIMES, 5, 6.

Party may not be permitted to impeach his own witness although disreputable and unsatisfactory — claim of privilege sustained by court does not correct erroneous ruling on admissibility of evidence.

See EVIDENCE, 1.

When trial court justified in finding that letter was never received.

See EVIDENCE, 2.

When testimony as to difference in amounts realized from crops before and after trespass admissible.

See LANDLORD AND TENANT, 4.

When jury could not legitimately have inferred from the evidence facts essential to the verdict, the verdict cannot be sustained.

See NEGLIGENCE, 2.

Question of fact — when new trial should be ordered.

See NEGLIGENCE, 6.

TRUST.

Apportionment between life beneficiaries and remaindermen of subsidiary stocks distributed on dissolution of holding corporation, stock of which formed part of trust fund.

See DECEDENT'S ESTATE, 5.

When will clearly and explicitly expresses the desires of a testatrix creating a charitable trust the court will not bestow her estate upon next of kin upon a claim that the gift is unreasonable in amount for the purposes of the trust.

See WILL, 1.

TRUSTEES.

Commissions of deceased trustee — surrogate or Supreme Court has discretionary power to award or withhold commissions for services rendered by trustee before his death.

See COMMISSIONS, 2.

UNDERTAKING.

When new trial was granted on conditions but was not had because plaintiff appealed from the order which was reversed and judgment reinstated, the surely on undertaking for new trial need not pay reinstated judgment upon defendant's failure to pay the same. The court granted a motion to set aside a verdict upon the condition among others that

UNDERTAKING — *Continued.*

defendant file an undertaking conditioned for the payment of any judgment which may be recovered by the plaintiff against him with which condition defendant complied. Plaintiff appealed from the order which was reversed and the verdict of the jury reinstated, whereupon judgment was entered thereon. In this action to recover on the undertaking, *held*; that the purpose of the undertaking was to obtain a new trial, and its condition should be construed and enforced with reference to that purpose, and so construed it covenanted only to pay any judgment resulting from or arising by reason of a new trial. Hence, the complaint was properly dismissed. *Grafson v. U. S. Fidelity & G. Co.* 162

USURY.

When agreement to repay loan with a specified bonus dependent upon varying conditions of sale of patented invention is usurious. Where the debtor may under the terms of a contract relieve himself of all further liability by payment of the principal and interest of a loan, there is no question of usury involved even though on certain contingencies a greater amount would become due. On examination of the terms of an agreement for a loan which was to be repaid with certain sums as a bonus dependent upon varying conditions relative to the sale or license by the borrower of certain patented inventions, *held*, that the agreement was such that the borrower could not by its terms be relieved of the payment of a greater sum than the principal and interest at the legal rate and, therefore, the loan was usurious. *Diehl v. Becker.* 318

When mortgage may be kept alive after payment thereof — guarantor of loan to a corporation cannot raise defense of usury — defense of usury in action to foreclose mortgage — when facts do not sustain such defense.

See MORTGAGE, 1-3.

WATER AND WATERCOURSES.

See Seaman v. City of New York (Mem.), 572.

A tenant at will occupying and working land injured by the abstraction of water from the land for municipal purposes is entitled to the damages caused thereby — damages — evidence — when difference in amounts realized from crops before and after the trespass admissible upon the question of usable value.

See LANDLORD AND TENANT, 1-4.

WATER WORKS.

See People ex rel. Buckley v. Spring Valley Water Works & Supply Co. (Mem.), 561.

WILL.

1. *Construction — Charitable trust — Masses — When will clearly and explicitly expresses the desires of a testatrix creating a charitable trust the court will not bestow her estate upon next of kin upon a claim that the gift is unreasonable in amount for the purposes of the trust.* Where a testatrix, after making certain bequests, bequeathed the residue and remainder of her estate to her executors "to pay funeral expenses, say masses and put a modest tombstone over my remains," the executors took title to the residuary estate in trust and it is their duty, after paying funeral expenses and for a monument, to dispose of the remainder of the residuary estate by having masses said in a Roman Catholic church, according to the customs of that communion.

WILL — Continued.

The testatrix was free to judge for herself what was reasonable in amount for the purposes of the trust. The trust was not void for indefiniteness and the court will not take the estate from the trustees to bestow it upon the next of kin in disregard of the expressed desires of testatrix, but will uphold the will as it is written. Masses are religious ceremonials and a bequest therefor is upheld as a charitable trust. *Matter of Morris.* 141

2. Bequest and devise to beneficiary to use such part of principal as she might deem necessary and with power to sell real estate and use proceeds thereof — Executors cannot maintain action to recover moneys left at death of testator's widow — Right to action accrued to residuary legatees. When testator bequeathed to his wife the use of a certain sum of money for life "with the right and privilege to use such part or portion of the principal thereof as to her shall seem meet and proper," and also devised to her for life the use, rents and income of certain real estate with the right and privilege of selling the same, should she deem it necessary, and further provided that if there should be any part of the sum bequeathed to his wife and the said real estate or the proceeds thereof left at the time of her death, such moneys and said real estate or its equivalent should be divided among certain legatees, the executors of testator who in accordance with his will had turned over to his widow, absolutely and without reservation the moneys bequeathed, and real estate devised, to her, cannot maintain an action to recover certain bonds and mortgages constituting part of the fund bequeathed to the widow which she had transferred to another. After the delivery of the fund to testator's widow, the executors had no further control over or right to the fund. When testator's widow died whatever portion of the fund remained belonged to the legatees named in his will and hence whatever right of action there was accrued to such legatees. *Peck v. Smith.* 228

3. When gift to one followed by gift to another of such part as may remain at decease of first taker enforceable — Repugnant gifts. A gift to one followed by a gift to another of such part thereof as may remain at the decease of the first taker, can be enforced when the intention of the giver is clear and definite to limit the gift to the first taker to a life estate with power to dispose of the principal or any part thereof during his lifetime and to give to another such part of the principal as is not disposed of in the lifetime of the first taker. The gift over after a gift that is apparently absolute is sustained because it is ascertained that it was not the giver's intention to make an absolute gift, but one qualified and limited by the subsequent or other provisions of the will or instrument creating the gifts. The common-law rule governing repugnant gifts has been changed by statute (Real Property Law [Cons. Laws, ch. 50], § 57; Personal Property Law [Cons. Laws, ch. 41], § 11). *Tillman v. Ogren.* 495

4. When absolute gift not modified or qualified by subsequent provision. Where there is an absolute gift of real or personal property, in order to qualify it or cut it down the latter part of the will should show equally clear intention to do so by use of words definite in the meaning and by expressions which must be regarded as imperative, and where a wife gave all of her residuary estate to her husband, his heirs and assigns forever, "with the understanding" that at his decease all of the estate which he should derive under her will and then undisposed of should be given and turned over to the sister of testatrix, such provision constituted a clear, certain, unqualified and absolute gift to the husband; the statement that such gift was given "with the understanding" that the husband should give any part of the residuary estate not disposed of by him to testatrix' sister does not import a

WILL — *Continued.*

contract already made or arising from an acceptance by her husband of the bequest and devise. The gift to the husband was absolute and there was no gift to the sister. *Id.*

See Hollender v. Wallace (Mem.), 614; *Petry v. Langan* (Mem.), 621; *Matter of Brand* (Mem.), 630; *N. Y. Life Ins. & Trust Co. v. Gallatin* (Mem.), 637; *Hamilton v. Muncie* (Mem.), 643; *Edgar v. Waldo* (Mem.), 656; *Kernochan v. Farmers' Loan & Trust Co.* (Mem.), 658.

WITNESSES.

Party may not be permitted to impeach his own witness although disreputable and unsatisfactory — claim of privilege sustained by court does not correct erroneous ruling on admissibility of evidence.

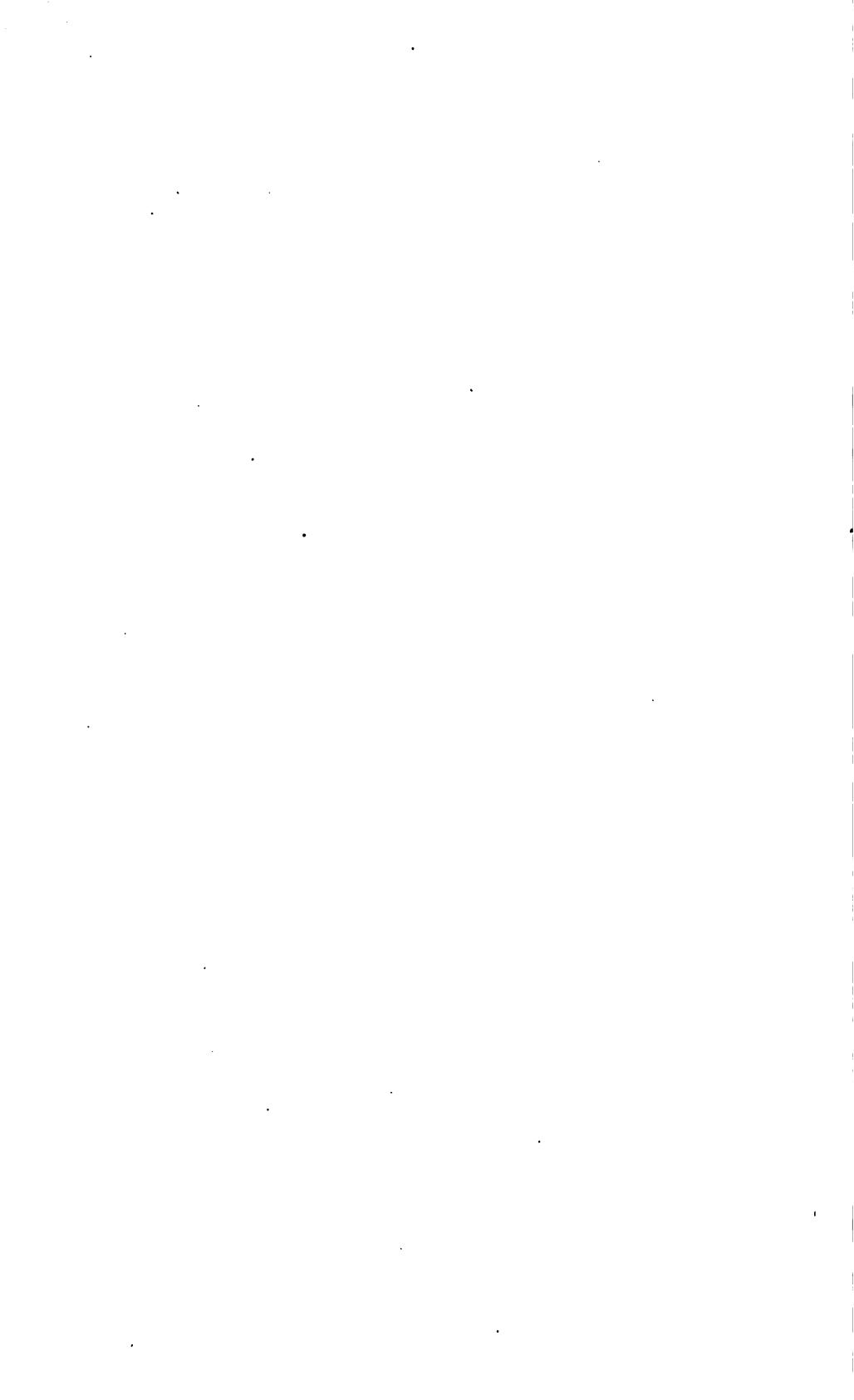
See EVIDENCE, 1.

WORKMEN'S COMPENSATION.

See Matter of Hart (Mem.), 554; *Matter of Schiff v. Scheuer* (Mem.), 596; *Matter of Dodd v. Four Sixty-one Eighth Avenue* (Mem.), 597; *Matter of O'Esau v. Bliss Co.* (Mem.), 597.

Workmen's Compensation Law of New Jersey — a servant, a resident of New Jersey, having, as permitted by the New Jersey statute, elected to accept the remedies provided thereby instead of the common-law remedies for injuries, his legal representative cannot maintain a common-law action for the death of such servant from injuries received while working in this state.

See MASTER AND SERVANT, 2.



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Stoddard v. Stoddard, 13, 14.

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Practice of law by corporation in violation of statute (Penal Law, § 280); When drawing of bill of sale and chattel mortgage by title guarantee and trust company not a violation of the statute.

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Wilson v. Israel, 423, 425.

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New York (city of); Award in condemnation proceedings instituted to acquire land for municipal purposes; When such award has been duly confirmed by the courts and the award paid as directed therein, a mortgagee who has failed to present and prove her claim thereunder cannot maintain an action against the city to recover the mortgage debt.

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Matter of Hirshfield v. Cook, 297, 300.

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Auburn Draying Co. v. Wardell, 1, 3.

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Holman v. Patten, 22, 23.

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People ex rel. Barcalo Mfg. Co. v. Knapp, 64, 68.

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Sudden stopping of street car to avoid running over child; When negligence cannot be predicated thereon.

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Agreement for re-adjustment of debts of corporation and transfers to and from voting trustees; When one, only, of transfers made for and in pursuance of such agreement subject to the transfer tax.

Hudson & Manhattan R. R. Co. v. State, 233, 234.

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Contingent fee; Contract between attorney and client valid in absence of fraud; Such contract, however, between attorney and executor for prosecuting action for death subject to review by court; Distribution of recovery in action under the statute; Meaning of term "children" in section 1903 of Code of Civil Procedure.

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McNamara v. Leipzig, 291, 292..

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Nicholson v. Greeley Square Hotel, 345, 346.

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WILL.

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Rolfe v. Hewitt, 486, 495.

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Wilds v. Board of Education, 211, 213.

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Bequest and devise to beneficiary to use such part of principal as she might deem necessary and with power to sell real estate and use proceeds thereof; Executors cannot maintain action to recover moneys left at death of testator's widow; Right to action accrued to residuary legatees.

Peck v. Smith, 228, 229.

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ATTORNEYS.

Statute (Penal Code, § 270) prohibiting any person from practicing as an attorney at law unless duly licensed and admitted to practice in courts of record; Acts constituting violation of such statute.

People v. Alfani, 334, 335.

EVIDENCE.

Decedent's estate; Claim based upon an oral contract or promise of decedent; Corroboration of testimony of claimant; When corroboration not required as matter of law.

Matter of Sherman, 350, 351.

CORPORATIONS.

Practice of law by corporation in violation of statute (Penal Law, § 280); When drawing of bill of sale and chattel mortgage by title guarantee and trust company not a violation of the statute. (Con. op.)

People v. Title Guarantee & Trust Co., 366, 380.

MURDER.

Killing of proprietor of store which defendant and a companion had attempted to rob; When fatal shot was fired by companion of defendant after they had left the store and were trying to escape defendant is not guilty of murder in the first degree unless the jury finds deliberation and intent to kill; Whether defendant and his companion were still conspirators and violence used was part of their scheme question for the jury; Erroneous charge.

People v. Marwig, 382, 384.

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Rolfe v. Hewitt, 486, 495.

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SERVICE OF PROCESS.

Execution; Wages; Personal service must be made upon the employer, of execution directed against wages of employee, to make employer liable to the judgment creditor.

Starke v. Beckwith Special Agency, 42, 43.

RAILROADS.

Street crossings; Negligence; Action against railroad to recover damages arising from fire so far as they were enhanced by blocking of a street crossing by freight train.

Globe M. I. & S. Co. v. N. Y. C. & H. R. R. Co., 58, 60.

DECEDENT'S ESTATE.

Short Statute of Limitations; What must be done to set such statute in operation; Usury; When agreement to repay loan with a specified bonus dependent upon varying conditions of sale of patented invention is usurious.

Diehl v. Becker, 318, 323.

RAILROADS.

Negligence; When railroad company not liable for death of an employee under the Federal Safety Appliance Act.

Lang v. N. Y. Central R. R. Co., 507, 508.

INSURANCE (LIFE).

Loans on policies; Cancellation of policies for failure of insured to pay loans; What constitutes sufficient notice to borrower of intention of company to cancel policies for borrower's default to renew loans or pay interest thereon.

Stevens v. Mutual Life Ins. Co., 524, 526.

ELKUS, J.**RAILROADS.**

Negligence; Injury to person lying upon track; Engineer of moving train bound to use reasonable care, only, to see such person.

Kretik v. N. Y. Central R. R. Co., 474, 475.

PER CURIAM.**APPEAL.**

Unanimous affirmation by Appellate Division of order confirming report of commissioners in proceedings by city of New York, under chapter 724 of Laws of 1905, to acquire lands for water supply purposes, not appealable, without permission, to Court of Appeals.

Matter of Brigham v. City of New York, 575, 576.

WRIT OF PROHIBITION.

Writ to restrain hearing and determination by surrogate;
Will not be issued if surrogate has acted and entered decree and his term of office expired.

People ex rel. Safford v. Washburn, 585.

MOTION FOR RE-ARGUMENT.

When motion fails to show that anything decisive was overlooked and only amounts to a motion for a new presentation of the same question, the motion should be denied.

Matter of Quinby v. Public Service Comm., 601, 602.

APPEAL.

When judgment entered upon order of reversal insufficient; Case remitted to Supreme Court for perfection of judgment; Not reviewable by Court of Appeals on appeal from order alone.

Hermann v. Ludwig, 632, 633.

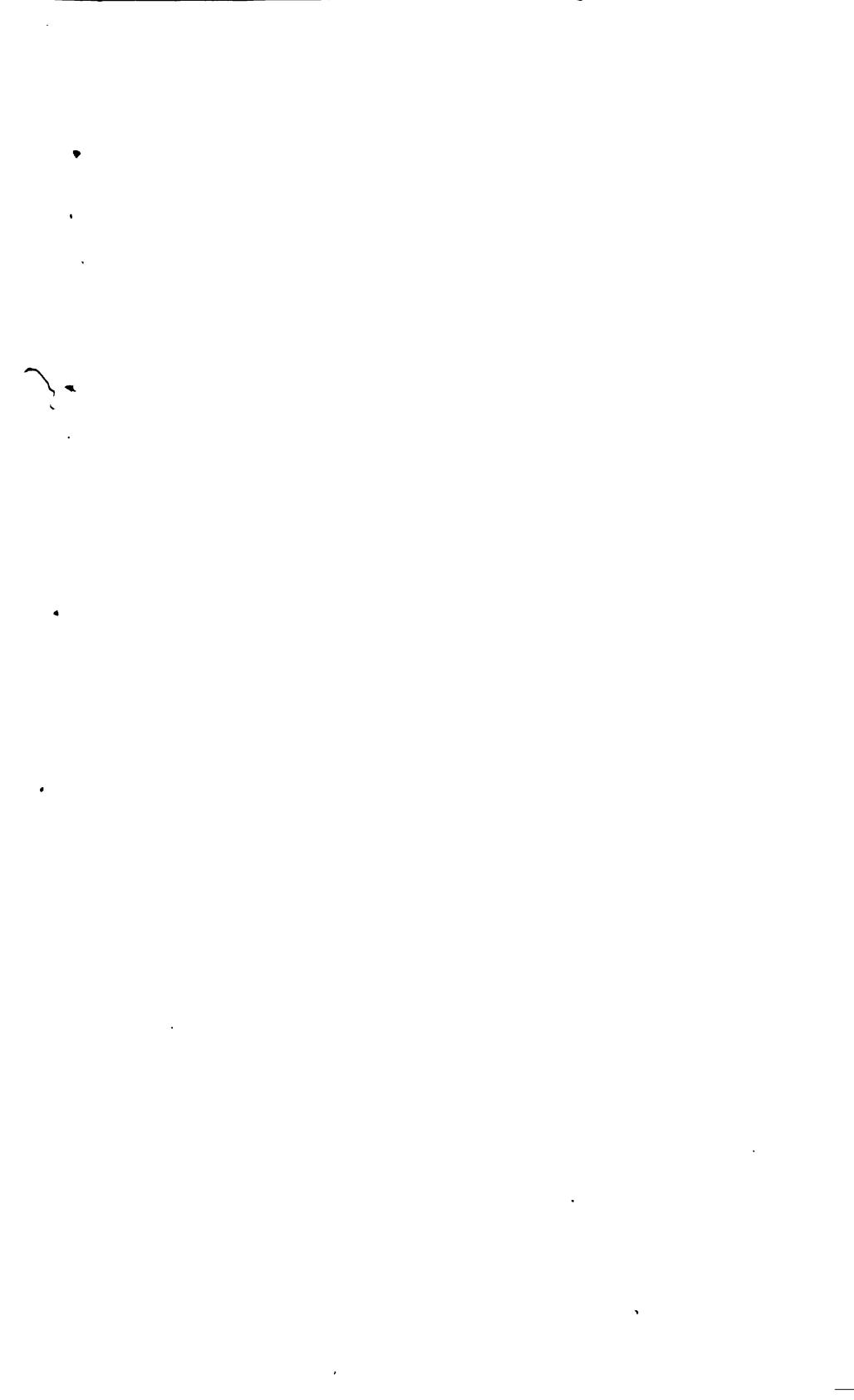
DECEDENT'S ESTATE.

Trust; Apportionment between life beneficiaries and remaindermen of subsidiary stocks distributed on dissolution of holding corporation, stock of which formed part of trust fund.

Macy v. Ladd, 670.

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